United States Court of Appeals

for the Second Circuit

APPELLEE’S BRIEF

75-1246

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To be argued by
AUDREY STRAUSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1246

UNITED STATES OF AMERICA,
Appellee,

—v.—

DONALD EUCKER, CARL W. ANDERSON,
FERGUS M. SLOAN, JR.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Carl W. Anderson, Donald Eucker and Fergus M. Sloan, Jr. appeal from judgments of conviction entered on June 16, 1975, in the United States District Court for the Southern District of New York, before the Honorable Whitman Knapp, United States District Judge.*

Indictment 74 Cr. 859, filed on September 10, 1974, charged the three defendants, and two others, in nine counts with conspiracy and substantive violations of the

* The defendant Anderson was convicted on April 30, 1975 after a four-week trial before Judge Knapp and a jury. The defendant Sloan pleaded guilty on March 31, 1975 and is now appealing from that plea; the defendant Eucker pleaded guilty on March 14, 1975, before trial, and now is also appealing from that plea.

federal securities laws.* Count One charged the five defendants with conspiracy to violate the federal securities laws, in connection with the maintenance of inaccurate records and documents by Orvis Brothers, a Wall Street brokerage firm, the hypothecation of fully-owned customer securities in the possession of Orvis Brothers, and the maintenance of credit for Orvis' customers beyond the period permitted by law, all in violation of Title 18, United States Code, Section 371. Counts Two through Seven charged each of the defendants with the substantive crimes of failing to make accurate records, thus hiding the serious financial condition of Orvis Brothers, in violation of Title 15, United States Code, Sections 78q(a) and 78ff, and Title 17, Code of Federal Regulations, Section 240.17a-3.** Count Eight charged the defendants with making false and misleading statements of Orvis' financial condition in a report filed pursuant to the Securities Exchange Act, in violation of Title 15, United States Code, Sections 78q(a) and 78ff, Title 18, United States Code, Section 2 and Title 17, Code of Federal Regulations, Section 240.17a-5. Count Nine charged all the defendants with the illegal hypothecation of fully paid for customer securities, in violation of Title 15, United States Code, Sections 78h and 78ff, Title 18, United States Code, Section 2 and Title 17, Code of Federal Regulations, Section 240.8c-1.***

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* In addition to Anderson, Eucker and Sloan, the indictment also named John J. Villani, and Thomas C. Kilduff as defendants. Kilduff pleaded guilty to conspiracy and does not appeal. Villani was acquitted by the same jury which convicted Anderson.

** By decision of the Court on February 12, 1975, Counts 2 through 7 were found to be in violation of the pertinent statute of limitations and were dismissed.

*** At the close of the case, and just prior to charging the jury, the Court dismissed Count Nine on the ground that to charge on this count would unnecessarily confuse the jury (Tr. 982-983, 2310-2312).

Trial against Anderson and Villani commenced before Judge Knapp on April 3, 1975. On April 30, 1975, the jury found Anderson guilty on Count One and not guilty on Count Eight; Villani was acquitted of both counts.

On June 16, 1975, Judge Knapp sentenced Anderson on Count One to a term of imprisonment of one year and one day. Sloan and Eucker also received the same sentence on their pleas of guilty to Counts One and Nine, respectively. All are at liberty pending their appeal.

Statement of Facts

A. Synopsis

The Government's evidence, presented through the testimony of twenty-three witnesses and approximately one-hundred fifty exhibits, established that from around January of 1969 through May of 1970, Anderson, Eucker, Sloan and their co-defendants helped to devise and carry out a massive scheme to hide the true financial condition of Orvis Brothers and keep the firm operating long after it lacked the necessary capital to do so.

In early 1969, Orvis Brothers was a highly respected Wall Street brokerage house, which had been doing business in the securities industry since the turn of the century. Orvis was a partnership and two major partners of the firm were Fergus M. Sloan, Jr., the managing partner and chief operating officer of Orvis, and Carl W. Anderson, the Chairman of the Executive Committee and the largest single financial contributor among the partners. In addition, Donald Eucker was a member of the Executive Committee and partner in charge of operations at Orvis, while Thomas C. Kilduff was also a member of the Executive Committee and was the partner in charge of financial operations. John J. Villani was similarly a partner and member of the Executive Committee.

In approximately April of 1969, at an Executive Committee meeting attended by the five defendants, Kilduff announced that, based on his calculations, Orvis Brothers was in very serious financial condition and was, in fact, in violation of capital ratios established by the New York Stock Exchange ["NYSE"] and Securities and Exchange Commission ["SEC"]. Sloan had previously instructed Kilduff to improve the appearance of Orvis' capital position by making two specific fraudulent entries on the books, which was discussed again at this April meeting. Kilduff was then told by Sloan and Anderson to take all steps necessary to keep the firm in business. Thereafter Kilduff, as the chief financial officer, continued falsifying the books and records of Orvis Brothers. Eucker, as the operating partner, began a practice of hypothecating fully paid for customer securities to secure loans, in an effort to improve the firm's financial position. As the two major partners of the firm, Sloan and Anderson were fully aware of Kilduff's and Eucker's activities.

After the April meeting, Kilduff continued to take steps to inflate improperly the capital assets of Orvis Brothers: he continued to carry in the Orvis cash account some $797,100 due Orvis as an account receivable from the Clinton Oil Company, although the sum was not presently due and, accordingly, should not have been treated as a present cash asset; he refused to post on the Orvis books commissions paid Orvis' salesmen for the sale of Clinton stock, which, if posted, would deflate Orvis' capital position; he improved the capital position of the firm's own trading account ("Kane account") by improperly recording $500,000 as a credit to that account; without the permission of an Orvis customer, Realto P. Clinton, he transferred securities from Clinton's own personal account to the account reflecting the $797,100 item, in an effort to secure the amount and make it less likely to be discovered; he posted on the books and records of Orvis a fictitious sale of $80,000 shares of Clinton Oil

stock to the non-existent Clinton Oil Pension Fund, thus increasing Orvis' capital by over $300,000; in 1969 and 1970 Kilduff placed on the Orvis books as a cash asset, 19,000 shares of worthless ICC stock purchased by Anderson for a mutual fund named the Fund of Letters, which refused to accept it, in violation of Regulation T of the Federal Reserve rules; and, finally, he recorded on the Orvis books the full value of some 9,344 shares of Clinton Oil stock sent to Orvis by Clinton for sale to third parties, without first deducting the cost of the shares. While all of these various acts were being done, Kilduff and, more importantly, Anderson, Sloan and Eucker, his intimate associates, continued to hide the true financial condition of the firm—and the true capital ratio of Orvis—from the general partnership and prospective investors of Orvis, as well as the NYSE and SEC. Anderson went so far as deliberately to mislead the general partners and representatives of the Clinton Oil Company, a major Orvis investor, into believing that the firm was in sound financial condition. The Government's evidence at trial proved conclusively that, at every step of the way, either before Kilduff acted to falsify the books, or shortly thereafter, he consulted and discussed his actions with the other defendants.

Simultaneously with Kilduff's falsifications of the Orvis books and records, Eucker was engaged in a deliberate practice designed to provide Orvis with necessary operating expenses. As with all Wall Street brokerage houses, Orvis was custodian for a large amount of fully paid for customer securities which the firm had bought at its customers' request, and was holding for safekeeping pending an order from such customers to sell. During 1969 and up through June of 1970, Eucker, in an effort to secure bank loans which would allow Orvis to remain in business, took these customer securities from the Orvis vault where they were segregated from other securities and pledged them as collateral to various banks for loans totalling approximately eleven million dollars. These

hypothecations were initially done without the knowledge or approval of the other defendants, but by at least the Spring of 1970, the defendant Anderson knew about Eucker's activities.

Beginning in August of 1969, Orvis Brothers, pursuant to the rules and regulations of the NYSE and the SEC, was audited by a private certified public accounting firm, Haskins & Sells. Kilduff and Eucker, who were in charge of the audit, gave false, fraudulent and misleading information to the auditors, once again attempting to hide the deteriorating financial condition of Orvis from the NYSE and the SEC. In October of 1969, Haskins & Sells submitted its report, entitled the X-17A-5 Report of Financial Condition, as required by law, to the NYSE and the SEC. Replete with fraudulent information, it stated, in substance, that Orvis' financial condition was sound, its capital ratio was well within acceptable limits, and that, although certain fully paid for customer securities had indeed been hypothecated, the matter had since been corrected.

In June of 1970, Orvis Brothers, no longer able to cover up its true financial condition, and unable to stay in business, closed its doors, leaving debts owed in excess of four million dollars. These debts resulted primarily from Orvis' inability to substitute its own assets for customers' hypothecated securities. The Orvis liquidator, appointed by the NYSE, received four million dollars from a special Exchange insurance trust fund to redeem the fully paid customer securities that had been pledged to banks by Orvis.

Anderson's defense consisted primarily of attempts to establish that the Government's principal witnesses, Kilduff and Chris Netelkos, were testifying falsely; that the April, 1969 meeting never took place; that he was, in fact, being eased out of the firm by Sloan and was

totally ignorant of Kilduff's and Eucker's fraudulent activities; and that the Government's entire conspiracy count was inapplicable to him because he had never joined a conspiracy, had no knowledge of any such conspiracy, and, above all, had done nothing to promote such a conspiracy.

B. The Government's Case

1. Orvis Brothers and the capital ratio

The Government's major witness was the cooperating co-defendant, Thomas C. Kilduff, the chief financial partner of Orvis Brothers and member of the firm's Executive Committee. Kilduff's testimony was corroborated in large part by the testimony of two other key witnesses: Realto Clinton, the President of the Clinton Oil Company, and Chris Netelkos, a proposed purchaser of Orvis Brothers.

Kilduff testified that in July of 1968 he joined Orvis Brothers as the firm's primary accountant and partner in charge of finance (Tr. 105-106).* In that capacity, Kilduff was responsible for computing the firm's capital position and was the partner generally in charge of the firm's books and records. In early 1969, Sloan was the managing partner of Orvis and, as such, was responsible for the daily operations of the firm; Anderson was "the Number 2 man of the firm" (Tr. 805, 877), the partner in charge of underwriting and the chairman of the Orvis Executive Committee which set the policy of the firm (Tr. 804, 113-114; GX 8). In addition, Anderson was the partner with the single largest financial interest in the firm, with a basic capital investment of $250,000, and stocks with a market value of $778,754 (Tr. 14, 1516; GX 2A); in addition, Anderson's wife had invested $200,000 (Tr. 141).

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* "Tr." refers to the trial transcript and "GX" refers to Government exhibit; "Anderson X" refers to the exhibits introduced into evidence by the defendant.

Although Orvis Brothers consisted of approximately forty partners, the Executive Committee was composed of eight or nine of these partners who sat as a "board of directors" (Tr. 117-118; GX 4). The Executive Committee would generally meet "approximately once a week, but there were also times when there were, you might say, impromptu metings" (Tr. 121, 1759-1760). Minutes of such meetings would be kept, transcribed and reviewed by Sloan or Anderson and, only then, distributed to the remaining partners (Tr. 123). However, if discussions of the Executive Committee involved matters "of a sensitive nature"—such as "the true nature of our capitalization"—such talk would not be transcribed for distribution to the general partnership (Tr. 146-148; 748-749). As Orvis slid deeper into financial difficulty, the taking of minutes rarely occurred (Tr. 1758, 1764, 1986).*

Kilduff testified that, from the time he arrived at the firm, until it ceased doing business in June of 1970, the capitalization of Orvis was a constant cause of concern to the Executive Committee (Tr. 149). Kilduff explained that Orvis was subject to the rules and regulations of the SEC and the NYSE concerning the computation of capital, especially Rule 325 of the Exchange. That rule provided that Orvis had to maintain a ratio of firm liabilities and firm capital assets "in such a way that the liabilities would not exceed 20 times the amount of capital" (Tr. 151). If a firm's capital ratio did, in fact, exceed twenty-to-one, the Exchange could order a firm to cease doing business or place restrictions on its business operations (Tr. 151). Kilduff added that Orvis' precarious capital ratio was a particular subject of discussion among all of the partners, including Anderson (Tr. 152-

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* Even when the minutes were transcribed, they were not very accurate. In fact, one partner who attended most of the later meetings testified that he did not "put any credence in anything that appears in the so-called minutes of an executive committee" (Tr. 1866).

153). It was Kilduff's responsibility to determine the important capital ratio at Orvis, with assistance from Eucker and various Orvis employees (Tr. 155). The ratio was periodically reviewed by Haskins & Sells, the firm's independent auditors who, pursuant to NYSE rules, made an annual unannounced audit of Orvis' books and records (Tr. 156). Also, the capital ratio was submitted each month by Kilduff to the general partnership (Tr. 162; GX 12, 12A). Beginning in 1969, the firm's capital ratio was constantly over twenty-to-one, with Kilduff instructing his employees to make certain "adjustments"—not all of them proper—to bring the capital ratio down to acceptable limits. During 1969 the general partners—*but not Anderson, Sloan or Eucker*—were kept in the dark about the true capital ratio (Tr. 917-920).

2. The pivotal meeting dealing with the Orvis capital ratio

In April of 1969, a meeting of the Orvis Executive Committee was held, attended by Kilduff and Anderson, as well as by Sloan, Eucker and Villani (Tr. 191-192). At that time, Kilduff presented a documentary analysis of the firm's capital ratio, informing the others that Orvis was in critical straights with a ratio of "approximately 30-to-1" (Tr. 193; GX 26).* In addition, Kilduff told Anderson and the others "the number of dollars that we would need in order to reduce our capital ratio back to within the allowed limits" (Tr. 206). This, too, was demonstrated on the back of the same document (GX 26), which was shown to everybody and discussed (Tr. 206-207). At this point an "excited type of conversation

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* Indeed, Orvis' capital ratio had been computed to be over twenty-to-one as early as June of 1968, but, at Kilduff's instructions, Orvis employees had recomputed the capital and made adjustments to bring the ratio safely back to under twenty-to-one (Tr. 914-915, 917).

took place", with Sloan stating that "very shortly everything will be all right, but keep the place going" (Tr. 207). Anderson concurred, stating that "you have got to keep the place going", both Sloan and Anderson adding that "Just make sure we stay in business, we keep the doors open" (Tr. 207-209). All of those attending the meeting offered suggestions as to how more capital could be secured for the firm.*

At this point, a discussion ensued as to how to treat the commissions Orvis expected to receive during 1969 from the sale of Clinton oil and gas units.** Since March of 1969, Kilduff, at the suggestion of Sloan, *and with the knowledge of Anderson,* had been treating the Clinton commissions—projected at that time, to be $797,100—as current capital even though the commissions were, in

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* The accuracy of Kilduff's computation of thirty-to-one was corroborated in part by the testimony of an Orvis employee, Howard Bascomb, that around May of 1969, he computed and gave to Kilduff an Orvis capital ratio of thirty-four-to-one (Tr. 933-934; GX 26B). Again, on August 31, 1969, at the time of the Haskins & Sells audit, another Orvis employee computed the capital raito at 19.39-to-one, not charging against capital, however, as he should have, the amount of $797,100 carried in the firm's cash account as an account receivable from the Clinton Oil Company. See, *infra*, pp. 11-13. With such a charge, the ratio would be 62.2-to-1 (Tr. 1038).

** In February of 1969, Orvis became a principal broker in the sale of Clinton Oil Company oil and gas units to the public (Tr. 177). Under the arrangement entered into with Clinton, Orvis would attempt to sell "units" of the company, valued at $10,000 each, to the investing public. The owner of a unit would be entitled to participate in the profits which Clinton Oil would derive from its oil and gas exploration (Tr. 177-178). A purchaser of a unit would pay Clinton Oil directly in four separate installments (Tr. 179). Orvis would receive a six percent commission ($600) on the sale of each unit at the time the full purchase price was paid by the customer to Clinton Oil (Tr. 1155). In February of 1969, Orvis *projected* that it would sell twenty million dollars worth of Clinton units in 1969, receiving commissions of $1,200,000 (Tr. 178).

actuality, a receivable due later in 1969 (Tr. 187-191, 217, 220, 883). At this April meeting, Kilduff highlighted this point, stating to Sloan, Anderson and the others that "one of the things that we're doing to prop up our capital was not reporting the receivable side of the commission as a charge against our capital" (Tr. 209).* Again, Sloan and Anderson told Kilduff to "make sure we stay in business" until new capital was secured (Tr. 209).

Neither Kilduff, Anderson nor anybody else proceeded to inform the general partnership of this newly discovered thirty-to-one capital ratio (Tr. 214). Rather, the April monthly capital ratio distributed to the general partners showed the ratio at a healthy 14.3-to-1 (Tr. 215-216; 1780; GX 27). In addition, no minutes of the thirty-to-one capital ratio discussion was ever transcribed or made part of the official committee minutes (Tr. 221-223).**

3. The other various ways that the Orvis books were falsified in order to inflate capital

a. Collateralizing the commissions account

Kilduff also testified that, having agreed with the others to use the $797,100 in Clinton commissions as current capital, the problem then arose as to how actually to

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* Although the general partnership was, in fact, subsequently told of the Committee's decision to treat projected Clinton commissions as current profit, they were never told that the commissions were not being charged against firm capital for purposes of computing an accurate capital ratio (Tr. 231-232, 235; GX 4).

** As Kilduff put it, "In discussing capital at an executive committee meeting, at a time when our true capital position was in excess of 20 to 1, we would—I would talk about it with the others as to what the true status was. We would publish a number which was different than the true status by using some of the various things that we have discussed here over the few days, and publish a number that was within the capital bounds" (Tr. 748-749).

treat the item on the books of Orvis. Initially, Kilduff and Eucker ordered that the item be placed in a new cash account numbered 55-1400 "because on a superficial examination it wouldn't be detected as a recievable" (Tr. 236, 938). When questioned about such a treatment of the commissions by an Orvis employee, Eucker replied, "don't worry about it. I can convince the Exchange that it is a good receivable any time" (Tr. 939).

However, a problem arose as to what to name the account and how to classify it since the commissions had not yet actually been received. Kilduff and Eucker went to Sloan, who told them to place Realto Clinton's personal home address in Wichita on the account. This was done in August of 1969, just prior to the arrival at Orvis of the auditors, Haskins & Sells (Tr. 238; GX 30).

There was another obvious problem: since the $797,100 had not actually been received by Orvis, the account remained "open" on the books, *i.e.*, no cash or stock was available to collateralize what Kilduff called "the dangling debit" of $797,100 (Tr. 243). Accordingly, in August of 1969, Sloan told Kilduff and Eucker to remove some stock of Realto Clinton's, which had been deposited at Orvis by Clinton as part of his subordinated loan agreement, and place the stock in the 55-1400 account to "cover up the unsecured debit that was sitting in the account" (Tr. 244-245, 1043).* By doing this, Kilduff hoped to camouflage the account "so that it would appear to be a typical customer's account" (Tr. 245-246). The transfer was made in August, 1969, unknown to Clinton himself

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* Kilduff and Clinton testified that in 1968 and 1969 the fortunes of Orvis were directly tied to one Realto Clinton, who was President of the Clinton Oil Company of Wichita, Kansas (Tr. 167, 2171). Clinton was a close friend of Fergus Sloan and, through Sloan's efforts, Clinton and his wife had become subordinated lenders of Orvis in June, 1969, in the amount of two million dollars (Tr. 167, 2200).

(Tr. 254-255; GX 35, 37). Anderson became aware of this transfer of Clinton's securities around September of 1969 when the matter was discussed at various Orvis Executive Committee meetings (Tr. 247-48).*

b. Orvis' salesmen's commissions

Kilduff also explained that, although Orvis' own salesmen who sold Clinton units received a forty percent commission on each sale, this commission was not recorded on the Orvis books (Tr. 241-242). Thus, Orvis' capital was not reduced by the payment of such commissions. Kilduff instructed an Orvis accountant, Arthur Michael, not to "book the commission payable", and, as to such commissions already on the books, to reverse them (Tr. 884-885). This decision, not to deduct salesmen's commissions in computing capital, was known to the Executive Committee, including Anderson (Tr. 241).

c. The 9,344 shares of Clinton Oil

In March of 1969, the Clinton Oil Company sent Sloan some 4,000 shares of Clinton Oil stock with directions that it be sold to partners of Orvis (Tr. 263-267, 2215-2226). Sloan told Kilduff, Anderson and others of the Executive Committee that the shares had been sent by Clinton for sale to the partners and that the value of the shares would increase Orvis' capital position. Kilduff replied, in Anderson's presence, that if the shares were received as capital, the cost of the shares must first be subtracted. Sloan disagreed, saying "look, just take them in, and use them as capital. We need the capital now" (Tr. 267). Eucker subsequently posted the shares on the Orvis books "without cost", *i.e.*, as if Clinton had made a gift of the shares. The posting took place in

* Clinton knew nothing about this and was simply told by Sloan that certain stock had been transferred from his subordinated loan account because of error and confusion (Tr. 2206).

April, 1969, around the time Kilduff discovered the thirty-to-one ratio (Tr. 270-272; GX 40). In this way, Orvis' capital position was not deflated by the cost of the shares. Clinton himself was never told that the shares were being placed on the Orvis books without cost (Tr. 276).*

Again, in May, 1969, Sloan received 5,000 shares of Clinton Oil stock from Realto Clinton for sale to a third party (Tr. 287, 2217). And, again, Eucker, at Sloan's instruction, posted the shares in the Orvis trading account "without cost" (Tr. 288). Anderson subsequently was told of the posting in August, 1969 (Tr. 289-290). Clinton was not told and never received payment for these shares (Tr. 292, 2218).

d. Fund of Letters

Kilduff testified that during the latter part of 1968, up until the firm was liquidated in 1970, the Fund of Letters was treated improperly on the Orvis books as a customer cash account with a settlement date of five business days (Tr. 299-300). The account was the sole responsibility of Anderson, and became a *cause celèbre* at Orvis because of Anderson's inability to settle the account with the Fund of Letters (Tr. 303, 1698-1699).

Anderson first told the general partnership about the Fund of Letters in May of 1969, over six months after the deal had been made (Tr. 314-315, 1524). Anderson explained that in the Fall of 1968 he offered to negotiate the sale of 19,000 shares of unregistered Inter-

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* In August, 1969, Clinton, upset that Orvis had not paid him the cost of the shares he had delivered, simply deducted the cost from the commissions he owed Orvis for the sale of Clinton units (Tr. 294, 220; GX 106). Anderson knew of this also (Tr. 296).

national Controls Corporation ("ICC") stock from two Orvis customers, Bull and Hoffman, to a mutual fund, the Fund of Letters (Tr. 304). After Orvis had purchased the unregistered shares from Bull and Hoffman for almost $500,000, the Fund of Letters refused to accept the stock and Orvis was left with 19,000 shares of unregistered, hence worthless, ICC stock, and a debit balance on its books of almost $500,000. From October of 1968 until May of 1969, Anderson kept the deal secret from his partners at Orvis, all the time attempting to effectuate the transfer to the Fund of Letters (Tr. 305).* During this period, the Fund of Letters account was treated on the Orvis books as a valid, cash account even though the five-day settlement period had long since expired and the Fund had refused to pay Orvis (GX 46, 47). In May, 1969, when Kilduff and the others first learned of the Fund of Letters account, with its outstanding debit, Anderson told them that the sale would ultimately go through, "that it would all work out at the end" (Tr. 305, 310). Anderson continuously reiterated this view at subsequent partnership meetings and, *it wasn't until December 1969, some fourteen months after the original sale of the shares to Orvis, that the $500,000 was first charged against Orvis' capital* (Tr. 309).**

Kilduff testified that, although the account should have been a charge against capital right from the be-

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* When Orvis employees, troubled by the failure of Anderson to collect on the account, inquired about its status, Eucker told them "to stay out of it . . . We just had nothing to do with the whole account" (Tr. 1003-1004).

** Despite Anderson's protestations to the contrary, the Fund of Letters never did buy the stock from Orvis. When Orvis was liquidated in 1970, the account was simply closed. Nevertheless, on at least one occasion, Anderson actually lied and told a general partner that the account had been paid (Tr. 1755-1756). The partner, relying on this statement, invested an additional $75,000 in the firm (Tr. 1844, 311).

ginning, the various members of the Executive Committee including, of course, Anderson, knew that this was not being done—at least as of mid-August, 1969 when the matter was openly discussed in anticipation of the Haskins & Sells audit (Tr. 309-310).*

The testimony at trial of a former Orvis senior partner, Antonio J. Zalduondo, showed how Anderson, Kilduff and the other defendants had covered up the nature of the Fund of Letters transaction and prevented it from being charged against capital. Zalduondo stated that even though he was the senior partner of the firm, he did not even learn about the Fund of Letters transaction until May of 1969 (Tr. 1524). Despite the fact that Zalduondo made repeated efforts to get at the facts surrounding Anderson's unilateral decision to pay the two customers $500,000 of Orvis' money, he was blocked at every turn (Tr. 1528-1532, 1535, 1554; GX 60).** At no time was Zalduondo told *that the $500,000 Orvis debit in the Fund of Letters account was not being charged against capital* (Tr. 1532, 1652).

On June 19, 1969, Zalduondo attended an Executive Committee meeting and spoke out against Anderson and the Fund of Letters debit which Zalduondo erroneously believed was causing a tremendous drain on Orvis' capital position. Immediately after the meeting, Anderson approached him privately with "tears in his eyes" and said

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* In addition to the Fund of Letters account, three other Orvis accounts—Bozeman, Martin and Aquarius—were also treated as valid cash accounts, even though, in fact, they were debit accounts which should have been charged against Orvis capital. During the allocution of his guilty plea on March 31, 1975, Sloan admitted that these four accounts should not have been treated as customer cash accounts (Tr. 321; GX 52-55).

** And another partner, August Mezzetta, testified that "I heard about fifteen different stories from Mr. Anderson with respect to the Fund of Letters" (Tr. 1866).

"Tony, you don't know what you have done to me. Do you realize that because of this, of what you have done, I and Fergus Sloan and Kilduff would be kicked out of the Exchange?" (Tr. 1534).*

e. The emotional partnership meeting of August 20, and the decision to use Clinton's $500,000 improperly

In August of 1969, Kilduff discovered that the firm's own trading account, called the Kane account, had an additional loss of $500,000 (Tr. 337-338, 887). After reviewing the figure with Orvis employees, Kilduff immediately called Sloan at his home to explain that an additional loss of $500,000 had been uncovered. Sloan was shocked (Tr. 339). The very next day an emotional general partnership meeting occurred at the New York Athletic Club, attended by all of the Orvis partners, including Anderson (Tr. 1414, 1425, 1471, 1765). At the outset of the meeting Sloan announced that the firm needed "approximately a million and a half dollars capital in order to stay in business" (Tr. 342, 1441). The general partnership was completely surprised (Tr. 1491).** Sloan added that Haskins & Sells were expected to begin an audit shortly, and that new capital was desperately needed. Kilduff announced the discovery of the $500,000 loss, but added that the capital ratio of the

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* Zalduondo was kept in the dark, not only as to the Fund of Letters, but as to all of the improper bookkeeping entries made by Kilduff with Anderson's knowledge. For example, he was not aware that the 5,000 shares of Clinton Oil stock sent to Orvis for sale to the partners was posted on the Orvis books without cost (Tr. 1582-1583); and he always believed the Orvis capital ratio was well within acceptable limits (Tr. 1519-1520, 1675-1676, 1683-1684).

** At one point in the meeting, just prior to the partners' discussion of the Fund of Letters transaction, Anderson ordered the public stenographer not to record the conversation, saying it was "confidential" (Tr. 1412, 1438-1439; GX 61A).

firm was still under twenty-to-one (Tr. 1288). Kilduff, Sloan, Anderson and Eucker knew, of course, that the ratio was, in reality, over twenty-to-one (Tr. 343).*

Sloan announced that he would appeal to Clinton for additional capital and proceeded to telephone him in the middle of the meeting (Tr. 344). After talking to Clinton, Sloan told the partners that "Rick is sending me a half a million dollars, so we are part way down the road, but we still have a million to go" (Tr. 344). Anderson added that he would also make an effort to secure new capital.

In point of fact, although Sloan had indeed telephoned Clinton, the latter had not promised to send Sloan $500,000 *as capital* to help Orvis. Sloan had asked for the money to improve Orvis' capital position but Clinton had turned him down. Instead, Clinton offered to send a check for commissions owed to Orvis on the sale of the oil and gas units (Tr. 2183-2184). According to Clinton, Sloan replied that "that would not do. I need capital, not just cash" (Tr. 2184). But Clinton refused, saying "I'm sorry, but that's all I will do." Sloan reluctantly said "Okay" (Tr. 2184).

A few days later Clinton sent the $500,000 to Sloan, *but as a payment of commissions not as a capital loan to Sloan* (Tr. 354-355, 218; GX 105). Kilduff and Eucker met with Sloan and told him that, in order to place the money in Sloan's firm capital account, certain papers would have to be filed. Sloan replied that the

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* In addition to Kilduff's misrepresentations made to the general partnership, Anderson "always said that everything was fine, that there was always new capital coming in" (Tr. 1310, 1519-1520). The morning of August 20, Sloan had addressed all of the Orvis employees and told them that "the capital of the firm was, in fact, in good shape. At the partnership meeting that night, however, Sloan did "a complete turnabout" (Tr. 1442-1443).

money "is not a loan to me, it is really a payment of part of the commissions that is due us from Clinton Oil" (Tr. 357). Kilduff replied that, since that was the case, "we can't use it as capital if it is not a loan to you" (Tr. 357). However, Sloan insisted that the $500,000 be used to improve the firm's capital position, despite the fact that the money should have been used to offset the $797,100 already improperly posted as capital (Tr. 365). Accordingly, Kilduff and Eucker placed the $500,000 in the firm trading account to offset the loss recently uncovered, thus improperly improving the firm's capital position by $500,000 (Tr. 358-360, 1039; GX 63). Although Anderson played no part in improperly posting the $500,000, he was aware of it (Tr. 362-364).*

f. The fictitious 80,000 share trade

In August of 1969, Orvis Brothers purportedly sold 80,000 shares of Clinton Oil stock, owned by the partners of Orvis to the Clinton Oil Pension Fund for $880,000 (Tr. 373). As a result of this sale, Orvis eliminated the thirty percent capital penalty imposed on shares owned by a brokerage firm.** The sale was the complete responsi-

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* In December of 1969, the $500,000 was removed from the firm trading account and posted in the commissions account (Tr. 370; GX 66). When the Orvis employee responsible for computing capital learned that the $500,000 in the trading account actually was income from commissions and had been improperly placed in the trading account to help Orvis' capital ratio, he "started looking for a job . . . because that was the final straw, I think, in the way the computations of capital were prepared for the Exchange" (Tr. 1039-1040).

** According to the rules of the NYSE, shares held as firm capital are not valued, for capital ratio purposes, at one hundred percent market value; instead they are valued at seventy percent to account for market fluctuation. This practice of taking a thirty percent "haircut" on firm-owned shares, of course, reduces the value of the shares in computing the firm's capital by that percentage (Tr. 374).

bility of Sloan, who had been pushed by Kilduff, Eucker and other partners to make the sale in August, just before the auditors arrived (Tr. 375). Sloan, Anderson, and two other Orvis partners went to see Clinton in Wichita in August, and when they returned to New York, Sloan announced that the sale had been made to the Pension Fund (Tr. 376). A day or two later Eucker noticed that the sale of the shares had not yet been posted on the books of Orvis, so he spoke to Sloan about it with Kilduff and Anderson present, warning him that if the sale was not posted by August 31, 1969, it would not appear on the August books in time to help Orvis' capital ratio when the August audit was conducted by Haskins & Sells (Tr. 378-379). On August 26 or 27, Sloan personally put the 80,000 share sale on the Orvis books and, since processing of the sale normally takes five days (which, in this case, would have placed the sale on the September books), Sloan *backdated* the sale to insure that it would be treated as an August transaction (Tr. 380, 843, 1292-1293; GX 67A). The address of the Pension Fund posted on the account ledger was the private address of Realto Clinton (Tr. 383). *At no time did Orvis ever receive payment for the sale of these shares*, although the account remained open on the books until the firm was liquidated, at which time the sale was reversed and the 80,000 shares were transferred back to the firm account (Tr. 383; GX 69A).

g. At Eucker's instructions, employees of Orvis Brothers hypothecate fully paid for customers' securities.

In 1969 and 1970, the office manager at Orvis Brothers, Philip Lanz, began to hypothecate fully paid for customer securities at the express instruction of Eucker and in violation of the rules of the NYSE and the SEC (Tr. 1129, 1934). According to Lanz, Orvis used securities held for the safe-keeping of its customers

as collateral to secure bank loans (Tr. 1126). Lanz testified that, in the normal course, Orvis would segregate the fully paid for customers' securities from all other securities being held by Orvis and would place them in the vault so that they would not be used for any purpose (Tr. 1127). However, in 1969, Lanz testified that Orvis was in "bad shape" and began to use the customer securities to secure bank loans for capital (Tr. 1128).

In the summer of 1969, when Haskins & Sells arrived at Orvis to conduct an audit, the hypothecation problem "really came to a head." Lanz told Eucker that unless Orvis could substitute its own securities or cash for the customers' securities being held by the banks as collateral, the auditors would surely learn about the hypothecation. Eucker told him "that the problem would be taken care of"; that Orvis was expecting a new influx of fresh capital; and that Eucker would see to it that a project was started at once to substitute other stock for the fully paid customers' securities (Tr. 1128).

Eucker, Kilduff and Lanz met with Sturgis and Taggart of Haskins & Sells, who stated that they were aware of the hypothecation problem and wanted to know what was being done about it. Eucker repeated that hypothecation had always been a problem at Orvis, but that the NYSE was fully aware of it; that fresh capital would be coming in, and that a project to substitute for the customers' securities had begun (Tr. 1339; GX 141). Haskins & Sells was satisfied, on the basis of these representations (Tr. 1133-1134, 1393-1394). Accordingly, the X-17A-5 financial questionnaire filed October 16, 1969 stated that although hypothecation of fully paid for customer securities is $5,965,146, this amount has been "since corrected" by substitutions or cash payments (Tr. 1337-1338, 1392).

Shortly thereafter, in October, 1969, Lanz and an Orvis employee, Joseph Giordano, began to substitute Orvis stock for the securities of customers already pledged to banks (Tr. 1129-1130). This project continued into January of 1970, until Lanz and Giordano "got to a point where we just couldn't do any more" (Tr. 1131). After substituting Orvis stock, Lanz realized that Orvis was still short some two and one-half million dollars (Tr. 1131). Lanz told Eucker "this is it. Giordano and I just can't go any further with this project. There is no way of getting any more stock out without cash to pay the bank loans off and get the money out" (Tr. 1132). Eucker assured Lanz that new capital would be forthcoming, but, in fact, a complete substitution never occurred (Tr. 1132). By May of 1970, when Haskins & Sells again arrived at Orvis to conduct an audit, hypothecation of fully paid for customer's securities had soared to over six and one-half million dollars (Tr. 1351; GX 142A).*

4. The Goodbody report and its disclosures of improper bookkeeping at Orvis Brothers

In March of 1969, a management consultant, H. Pim Goodbody, Jr., was hired by Orvis Brothers to analyze Orvis' operations with a view toward offering advice as to how operations could be made more efficient (Tr. 1070-1072). Goodbody worked at Orvis from March through August of 1969, interviewing Orvis employees and the Orvis partners, including Anderson (Tr. 1072). In add-

* To prove that hypothecation of such securities had actually increased from August 31, 1969 through May of 1970—thus negating the claim in the X-17A-5 report that hypothecation had "since been corrected" as of October 16—the Government elicited testimony from Lanz (Tr. 1739-1744) and an SEC investigator, David Soffler, who testified as to his analysis of the Orvis books and records, which showed an increased use of fully paid for customers' securities rather than that such hypothecation had been "corrected" (Tr. 1913-1923; GX 155c).

ition, Goodbody analyzed the financial and operations data made available to him, such as profit and loss statements, capital computations, work papers and the like (Tr. 1073).

In July, 1969, Goodbody prepared a final report of his findings and recommendations (Tr. 1074; GX 71). This report was extremely critical of Orvis Brothers. The report maintained that customer cash accounts were not current, certain capital ratios were "seriously low" and that Orvis' reports filed with the NYSE and the SEC were "significantly incorrect" (GX 71). Goodbody concluded by stating that capital computations were inaccurate and "obscured the actual situation as viewed from both inside and outside of the firm" (GX 71).

On August 11, 1969, Goodbody attended an Orvis Executive Committee meeting, at which Anderson and Eucker both were present, to discuss the findings made in his report (Tr. 1079). At this meeting, Goodbody defended his report and Eucker attacked it, claiming that the report was replete with factual errors and that the Orvis Operations Department, headed by Eucker, had made great strides in improving its back-log (GX 72).

5. Anderson meets with Gamelson and Clinton but says nothing about the true financial condition of Orvis and, instead, deliberately misleads them

In April of 1969, Lyndon Gamelson, general counsel and secretary of Clinton Oil Company, decided to become a subordinated lender of Orvis Brothers. Gamelson inquired of Kilduff as to the financial picture of Orvis and was told that the firm was in fine shape with a capital ratio of twelve-to-one (Tr. 1159). Relying on Kilduff's representations, Gamelson mailed his own shares of Clinton Oil stock, representing his investment as a subordinated lender, to Orvis in New York.

On August 22, 1969, Clinton, after attending a funeral in Memphis, Tennessee, met privately with Sloan, Anderson and Frank Doggrell, Orvis' resident partner (Tr. 2187-2189).* The meeting took place in Memphis, Sloan and Anderson having flown from New York. The four men sat at a table in a hotel bar and Sloan proceeded to tell Clinton that Orvis was in "deep financial trouble" and that, since Clinton was a major subordinated lender of the firm, he now "for all practical purposes" owned Orvis Brothers and would probably have to invest additional capital (Tr. 2190). Clinton was shocked and bewildered at this news, stating to Sloan, Anderson and Doggrell that it was his impression that Orvis had just received "capital of six or seven million" from himself and his Clinton Oil associates and that, therefore, "I just didn't see how that much money could disappear so quickly" (Tr. 2191). Clinton was "astonished by the attitude at the meeting" of Sloan and Anderson (Tr. 2191). Discussions were had as to how Clinton could improve the financial structure of Orvis. Sloan raised the possibility of Orvis selling 80,000 shares of Clinton Oil to the Clinton Pension Fund but Clinton replied that the company did not have a pension fund and, therefore, the matter would have to be discussed with counsel (Tr. 2192). The entire meeting lasted about one hour.

Clinton then returned to Wichita and immediately telephoned Gamelson and ordered him to fly to New York to visit Orvis (Tr. 2207, 2195). Clinton wanted Gamelson to find out exactly what was the true financial situation at Orvis.

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* Clinton had previously met with both Sloan and Anderson on numerous occasions in connection with Clinton Oil's business dealings and also to discuss the conditions upon which Clinton would invest in Orvis as either a partner or subordinated lender (Tr. 2173-2180; GX 112).

Gamelson and Benjamin Smith, the Clinton Oil Company general counsel, then journeyed to New York to make an unannounced visit to Orvis Brothers (Tr. 1160). On August 28, Gamelson and Smith arrived at Orvis, were told that Sloan was not available, and were ushered in to see Anderson. Gamelson and Smith told Anderson, who was very surprised at their visit, that Clinton had sent them unannounced to check on Orvis' financial condition, because Clinton had been pressured by Orvis to invest and was very worried (Tr. 1165). Gamelson told Anderson that Clinton wanted to determine if Orvis was complying with the capital ratio rules (Tr. 1163-1164). *Anderson told them that "there is no problem with the company", adding that the capital ratio was "between 12 and 15 at that time, that the auditing firm was there at the moment and everything was all right"* (Tr. 1164). *Anderson proceeded to go over Orvis' financial information with Gamelson and Smith* (Tr. 1242). *In addition, Anderson returned the stock Gamelson had presented to Orvis under his agreement as a subordinated lender, stating that it wasn't needed* (Tr. 1164). *Anderson reiterated that there was nothing to worry about and invited Gamelson to telephone Sloan at the latter's home* (Tr. 1165-1166; 1255). *Sloan completely corroborated Anderson's view that everything was fine at Orvis* (Tr. 1167, 1256; GX 113). *At no time did Anderson or Sloan make any reference to the purported sale that day of 80,000 shares of Clinton Oil stock from Orvis to the Clinton Oil Pension Fund* (Tr. 1168).*

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* It bears repeating that the attempt of the defendants to hide the deteriorating financial condition of Orvis was not limited to representatives of Clinton Oil, the NYSE, and the SEC. If the scheme to falsify the books was to succeed, the general partners also had to be kept in the dark. Thus, as late as October, 1969, Sloan, Anderson and the others were advising a general partner, August Mezzetta, to invest $75,000 in Orvis, since "the fortunes of the firm were improving" (Tr. 1751-1755).

When Gamelson returned to Kansas a few days later he reviewed his mail and, for the first time, saw the confirmation of the 80,000 share trade (Tr. 1169; GX 108). Gamelson "got awfully mad" that neither Anderson nor Sloan had said anything to him about such a substantial sale when he had been at Orvis just a few days ago, and immediately telegraphed Orvis that no such purchase had, in fact, occurred (Tr. 1170-1172, 2195-2196; GX 109). Clinton Oil Company also wrote a letter to Haskins & Sells denying that such a trade ever took place (Tr. 1174, 2198; GX 108A). When Gamelson and Clinton met Sloan and Anderson in Oklahoma the following week, *neither of the Orvis partners made any reference to the purported sale which Gamelson had cancelled by his telegram* (Tr. 1178, 2208-2211).* Nevertheless, in December, 1969, Clinton Oil received another Orvis confirmation concerning the 80,000 share sale and, again, Gamelson sent a telegram informing Orvis that no such purchase had been made (Tr. 1179, 2212; GX 110, 68).

In December of 1969, Benjamin Smith visited Orvis, again at the insistence of Clinton, to inquire about the financial condition of the firm (Tr. 1260). Again, Smith met with Anderson and Sloan (and Kilduff) and told them that he was there at the behest of Clinton, who was concerned about the finances of the firm. Smith received "assurances from each of the three, again more than once, I am certain, that there was no cause for any concern whatsoever" (Tr. 1261). Financial reports demonstrating the sound financial picture at Orvis were presented to Smith (Tr. 1261; GX 117).

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* Gamelson testified that *he* didn't mention it to Sloan or Anderson because he thought the telegram cancelling the trade had ended the matter (Tr. 1223).

6. The Haskins & Sells audit of August, 1969

During the last week of August, 1969, about twenty-five employees of Haskins & Sells arrived at Orvis to commence a surprise audit, pursuant to NYSE and SEC rules (Tr. 393-394, 1315, 1386).* The Haskins & Sells partner in charge of the audit was Carl Sturgis, assisted by Frank Vayda and Ray Taggart (Tr. 394, 1317-1318). Representing Orvis were Kilduff and Eucker (Tr. 395, 1320). The audit lasted for six weeks, during which time the auditors consulted with Kilduff and Eucker on frequent occasions. In October of 1969, Haskins & Sells filed its X-17A-5 report of Orvis' financial condition with the NYSE and SEC, concluding that Orvis was not in any financial difficulty and that the firm's capital ratio was satisfactory (Tr. 402, 1315; GX 74, 74a).

Kilduff testified that, in his discussions with the auditors, he deliberately misled them by not disclosing the various ways that Orvis' capital had been inflated. Thus, Kilduff allowed the auditors to treat the $797,100 commissions receivable as a cash account so that they would not charge it against capital (Tr. 406, 1390-1391); ** the Fund of Letters debit was similarly treated by the auditors who, relying on Kilduff's representations, treated it as a cash account so as to avoid a capital charge (Tr. 407-408, 1328-1329, 1389-1390); the fictitious 80,000 share trade was listed as a cash account although no money had been received from the Clinton Pension Fund (Tr. 408); the shares of Clinton Oil received by Orvis and posted to the Orvis investment account without cost were so re-

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* Haskins & Sells, a certified public accounting firm, had been the auditors for Orvis for approximately twenty years (Tr. 396).

** The auditors did not even question the validity of the account since, as already indicated, Kilduff had managed to collaterize it fully with Clinton's stock (Tr. 1330).

flected in the audit report, *i.e.*, without cost (Tr. 409); and, finally, the $500,000 received from Clinton as a payment for commissions was reported in the firm trading account, not the commissions receivable account (Tr. 409-410). Kilduff testified that he signed the audit report knowing about all these fraudulent inaccuracies (Tr. 410). In addition, Kilduff stated that, although Haskins & Sells found Orvis to be within a twenty-to-one capital ratio, he knew it was more than that (Tr. 411).

In October, 1969, at the conclusion of the audit, a meeting of the auditors and representatives of Orvis was held to discuss the results (Tr. 1321). Kilduff, Anderson, Eucker, Sloan and Villani represented Orvis as the report was reviewed page by page and approved by the auditors (Tr. 413, 1322-1323). It was then filed with the NYSE and SEC.

7. Chris Netelkos and the financial collapse of Orvis Brothers

During the remainder of 1969 and into 1970, the financial situation at Orvis continued to deteriorate, as huge losses piled up (Tr. 423; GX 83). In December of 1969, the NYSE found out for the first time that Orvis' capital ratio exceeded twenty-to-one and proceeded to place Orvis on a restricted status (Tr. 424-425, 726, 768).* This fact was made known to the general partnership and a concerted but unsuccessful effort was made to reduce the ratio to below twenty-to-one (Tr. 429).

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* The Exchange finding that Orvis was over twenty-to-one was based solely on the fact that certain partners of Orvis had retired and, in so doing, had withdrawn their capital. The Exchange was totally unaware of any fraudulent activity at this time.

In January of 1970, after some earlier initial overtures made to Sloan, Chris L. Netelkos offered to invest $250,000 in Orvis (Tr. 429-430; GX 58A). Netelkos made clear, however, to both Sloan and Anderson, that his investment was conditional on Netelkos' own independent auditors verifying that Orvis was financially stable (Tr. 1949). Shortly thereafter, Netelkos told Sloan that, on the basis of his preliminary audit, a $250,000 investment would be insufficient to help Orvis out of its financial difficulties (Tr. 1953). Netelkos stated that he might invest $500,000, but that if he were to invest such a sum, he must come into Orvis as the major senior partner of the firm, not as a lender (Tr. 1953, 2051). Sloan, Anderson and the other partners agreed and all of them signed a contract, but Sloan warned Netelkos that time was of the essence and that "the New York Stock Exchange has made a demand on us that you immediately put in at least $250,000 of the $500,000 investment" (Tr. 806-807, 842, 1957, 2155). Sloan thereupon invested the $250,000 (Tr. 1958).*

In January of 1970, Netelkos began to work at Orvis as an "investment adviser" to the Executive Committee (Tr. 2089-2090). Almost at once Netelkos found a "major discrepancy in the trial balance", caused by the improper hypothecation of fully paid for customers' securities (Tr. 1967). Netelkos was directed to Sloan and Anderson by Kilduff (Tr. 2128). Sloan and Anderson thereafter met with Netelkos at which time Netelkos reiterated his charge, adding that "anybody that does a routine type of audit will uncover" the errors (Tr. 1968). Netelkos added that by hypothecating such customer securities, the firm's capital ratio was being affected and "is making you look better than you really are" (Tr. 1970). Sloan and

* The NYSE ultimately rejected Netelkos' partnership application, so he was forced to become a suboridnated lender instead (Tr. 806-807, 1962, 2161).

Anderson simply said that the discrepancies would "resolve themselves out", that "it is just mechanical bookkeeping problems" (Tr. 1968, 1970). Sloan and Anderson also told Netelkos not to bring the matter up to the full Executive Committee until the problems were first resolved (Tr. 1970).

In March of 1970, Netelkos examined for the first time the Orvis X-17A-5 financial questionnaire of August 31, 1969 (Tr. 1973; GX 74). Netelkos immediately confronted Sloan with it, pointing out that, although the questionnaire stated that the hypothecation had "been corrected" this had not happened and, therefore, Orvis' capital had been inflated (Tr. 1974-1975). Sloan directed Netelkos to Anderson (Tr. 1975). Netelkos confronted Anderson with the same charge—that the hypothecation figure of August 31, 1969 had not been "corrected", and that, therefore, the figure in the questionnaire was wrong (Tr. 1975-1978). Anderson stated that "you're right, the figure is wrong. Don't waste my time with this" (Tr. 1978). Netelkos warned Anderson that if the Government checked the books Orvis would be out of capital ratio. Anderson replied that more capital would have to be brought into the firm (Tr. 1978-1979). Sloan and Anderson both added that "we'll take care of it. Okay" (Tr. 1979).

In April the financial situation continued to deteriorate, and the firm was "in very bad shape" (Tr. 435, 1908). Netelkos told Sloan and Anderson that the Executive Committee must be told about the hypothecation, *but Anderson stated that "I recommend that you don't do that"* (Tr. 1981-1982).

Finally, in April of 1970, Netelkos told the Executive Committee that the August 31, 1969 financial questionnaire was incorrect and that over ten million dollars of

customers' securities were currently being hypothecated. Netelkos added that, although Sloan and Anderson had told him the problem would not continue, it was getting worse (Tr. 1986-1987). Anderson said that adjustments would be made but Netelkos warned him that there were "consistent" discrepancies and "it has to stop" (Tr. 1987-1988). Anderson retorted that "if it stops, the firm goes out of business" (Tr. 1988).

Finally, in May of 1970, in the middle of Haskins & Sells' audit, the firm collapsed (Tr. 435). Kilduff told Anderson and the rest of the Executive Committee that "it was hopeless to try to continue to prop up the capital, that we were out of business and should go out of business." The NYSE was notified and shortly thereafter the Exchange appointed a liquidator to liquidate Orvis, assisted by Kilduff, Anderson, Sloan, Eucker and Villani (Tr. 437; GX 86).

C. The Defendant's Case

The defendant Anderson's case consisted primarily of his taking the witness stand and attempting to refute the testimony of Kilduff, Netelkos, Clinton and Gamelson concerning his knowledge of any wrongdoing. In addition, Anderson called four character witnesses and four other witnesses, in an unsuccessful effort to show that Kilduff had lied.

1. The other witnesses

Carl Sturgis, the Haskins & Sells partner in charge of the August, 1969 audit of Orvis Brothers' testified that when he visited the firm on October 15, 1969 to review the X-17A-5 questionnaire with Orvis' representatives, an entry in his personal diary showed that Kilduff,

Eucker and Sloan represented Orvis and that Anderson was not present (Tr. 2344-2345; Anderson BP.). On cross-examination, Sturgis stated that there were various meetings between Orvis representatives and other Haskins & Sells auditors, Frank Vayda and Ray Taggart, which he did not attend and which were not reflected in his diary (Tr. 2350-2351).

Ralph A. Musil testified that he had joined Orvis Brothers in 1942 as an assistant to the commodity manager, and became a partner in 1968 (Tr. 2374). In February of 1969 he was appointed to the Executive Committee (Tr. 2375). Musil testified that he attended all the various Executive Committee meetings throughout 1969, that minutes were kept for all such meetings, and that "at no time did Mr. Kilduff inform me at a meeting, executive meeting, partners meeting or any other meeting or personally that we were over [20-to-1]" (Tr. 2389, 2396). Nor did Musil ever see Kilduff's document showing a thirty-to-one ratio (Tr. 2389). Musil added that, although Kilduff had testified that the pivotal meeting at which the thirty-to-one ratio was discussed was some time in April of 1969, Musil knew of no Executive Committee meeting after April 15 and before May 6 of 1969 (Tr. 2391-2392). Nor could Musil recall Kilduff ever discussing how the Clinton Oil commissions were being treated on the Orvis books (Tr. 2393). Musil stated that he learned that the firm's ratio was over twenty-to-one in December of 1969, when it was discovered by the NYSE (Tr. 2398-2399). The Exchange advised Musil that the only reason Orvis was out of ratio was because a former partner had withdrawn his capital from the firm (Tr. 2399-2400). The Exchange allowed Orvis to continue in business (Tr. 2401).

On cross-examination Musil testified that, as commodity partner, he spent time away from Orvis Brothers

(Tr. 2403). He added that occasionally he would not attend entire Executive Committee meetings and that he had nothing to do with the financial aspects of the firm. He knew nothing about capital computations or profit and loss and was not friendly with Anderson, Kilduff or Sloan (Tr. 2404, 2407). Musil testified that he did not know whether there had been any informal meetings of the Executive Committee and that, in any event, he had not attended any (Tr. 2407). Musil added that in the spring and summer of 1969 he believed Orvis to be in good financial condition (Tr. 2408).

Margaret H. Eucker, the wife of Donald Eucker, testified that she and her husband had left for India on vacation on April 21, 1969 and arrived in Bombay on April 23, 1969 (Tr. 2412-2413). She and her husband returned on May 1.

2. Anderson's testimony

Carl Anderson then testified. His testimony was substantially in contradiction to the testimony of almost all of the other witnesses called at his trial. Anderson stated that he came to Orvis Brothers in 1969 as a partner and that his initial contribution had been $25,000 (Tr. 2417). His major area was corporate finance (Tr. 2419). Anderson stated that, as a director of some twenty other companies, he was away from the Orvis office a great deal, as much as two thirds of the time (Tr. 2420-2421). He maintained that he largely worked independently and had little contact with the rest of Orvis Brothers (Tr. 2422) (*contra* Villani, Tr. 2787; Kilduff, Tr. 805; Tournet, Tr. 877; Mezzetta, Tr. 1774; Netelkos, Tr. 2064).

Anderson stated that the Orvis partners had invested heavily in Clinton oil and gas units and that it had been a bad investment (Tr. 2426). He added that he was in Europe on vacation from April 30 to June 6, 1969 and that his last Executive Committee meeting was April 15

(Tr. 2426-2428). Anderson testified that he never recalled the pivotal Executive Committee meeting in April of 1969 when Kilduff explained the thirty-to-one ratio (Tr. 2428). (*Contra* Kilduff, Tr. 204-09).

Anderson stated that his role and authority in the firm steadily deteriorated after he returned from vacation, that Sloan and Kilduff were trying to ease him from power (Tr. 2428-2430) and that he did not get along with Netelkos (Tr. 2432).

Anderson testified that he was Chairman of the Executive Committee, which met formally every other week (Tr. 2465). (*Contra* Kilduff Tr. 121; Mezzetta Tr. 1758-59; Villani, (Tr. 2773, 2778). Minutes of the meetings were always kept (Tr. 2563). (*Contra* Kilduff, Tr. 146; Mezzetta, Tr. 1758, 1760, 1764).

Anderson then explained the circumstances surrounding the Fund of Letters: how Orvis had acted as a middle-man for the sale of 19,000 shares of unregistered ICC stock from Bull and Hoffman to the Fund of Letters; how Anderson felt "very happy" that the deal would be finalized when the Fund of Letters purchased the shares from Orvis, who had bought them from Bull and Hoffman (Tr. 2487); how the Fund of Letters suddenly balked at buying the unregistered shares after Orvis had already confirmed the sale from Bull and Hoffman who demanded payment (Tr. 2489); how it was poor business judgment on his part to commit Orvis to the sale before Fund of Letters agreed to be bound; and how the \$500,000 account ended up on the Orvis books (Tr. 2493-2494). Anderson stated that he always thought that the sale to Fund of Letters would ultimately take place and that he was working to that end. (*Contra* Leavitt, Tr. 1699-1702, 1713; GX 124).

Anderson added that Zalduondo's memorandum concerning the Fund of Letters and criticizing him was filled with "inaccuracies and omissions" and that Zalduondo's constant criticism of Anderson was motivated by a previous personal quarrel (Tr. 2520-2521). Anderson claimed that everyone at Orvis knew about the problems surrounding the Fund of Letters after November or December, 1968, and that it was, in fact, "the single most focal point in the firm" (Tr. 2523-2524). Anderson admitted, however, that the matter was not discussed in executive or general partnership meetings until "a later time", the Winter or mid-Spring of 1969 (Tr. 2524); however, "no one was trying to push it under the table" (Tr. 2525).

Anderson denied telling Mezzetta that the loss of \$500,000 in the Kane account had been paid by Robert Vesco (Tr. 2528). (*Contra* Mezzetta, Tr. 1755-1756, 1771). According to Anderson, Mezzetta might have been confused with Vesco's decision to invest \$500,000 in Orvis instead of Netelkos, an investment which never did take place (Tr. 2533).

Anderson testified that he never told anyone how the Fund of Letters should be recorded on the Orvis books' nor did he ever have any discussion as to how it should be used in computing capital (Tr. 2533).

Anderson testified that he was never approached by Zalduondo on June 19, 1969, with tears in his eyes, and that, in fact, he did not attend the partnership meeting on June 19 (Tr. 2536). (*Contra* Zalduondo, Tr. 1534; GX 19).

Anderson admitted traveling with Sloan to Memphis in August, 1969 to see Clinton, but stated that he went at Sloan's request to discuss Orvis' participation in a

convertible bond issue that Clinton Oil was going to underwrite (Tr. 2538-2539). Anderson recalled the conversation between Sloan, Anderson, Clinton and Doggrell, but testified that he was not always a party to what Sloan told Clinton, since Anderson spent some of the time talking independently to Doggrell (Tr. 2542-2543). (*Contra* Clinton, Tr. 2188-2193). Anderson said that he "heard" Sloan and Clinton discuss a sale of 80,000 shares of stock from Orvis to a pension fund, but he could not remember the details (Tr. 2543). (*Contra* Clinton, Tr. 2188-2193). Anderson said nothing to Clinton or Sloan.

Anderson added that he never did see the Clinton telegram denying the $80,000 share sale until at least February of 1971, but that someone told him about it in mid-September, 1969 (Tr. 2548-2549). He noted that, at the time he visited Clinton in Oklahoma and Kansas in September, 1969, he had not yet learned of the telegram. Nothing was said about the 80,000 share trade by Clinton during these visits (Tr. 2550). When Anderson learned about the telegram, he went to Sloan who told him "don't worry about it, it's a little technicality, it's a little problem I have to work out with Clinton. Don't worry about it" (Tr. 2551). Anderson demanded that Sloan rectify the matter, testifying that he "was very surprised" at Sloan's attitude (Tr. 2551). Anderson always thought it was a good trade.

Anderson reiterated that his role as Chairman of the Executive Committee had been "watered down" (Tr. 2564). (*Contra* Mezzetta 1774, 1761-64; Netelkos Tr. 2064; GX 8). He did not recall Kilduff ever discussing improper treatment of the $797,100 in Clinton commissions and knew nothing about them (Tr. 2566, 2571). (*Contra* Kilduff, Tr. 190-191, 207-11, 217, 309). He was away from Orvis on business from April 15 through April 18, and did not recall another Executive Committee meet-

ing until May 6 (Tr. 2570). Anderson testified that at no time did he ever say to Kilduff, "just make sure we stay in business, keep the doors open" nor did he hear anybody else say it to him (Tr. 2570-2571). (*Contra* Kilduff, Tr. 209). Anderson stated that he had nothing to do "with posting any of the entries on the books of Orvis with respect to the commissions on the oil and gas units" (Tr. 2572). Nor did he know about Clinton's securities being transferred to that account to collateralize the "dangling" $797,100 (Tr. 2572-2573). He testified that he knew nothing about Clinton sending the 9,344 shares to Orvis, and did not know how these shares were treated on the Orvis books (Tr. 2573-2574). (*Contra* Kilduff, Tr. 267, 289-290).

Anderson testified that although he had heard Sloan talk on August 20, 1969 about receiving $500,000 from Clinton he did not know whether Clinton actually had sent the money and had no idea how it was treated on the Orvis books (Tr. 2579). (*Contra* Kilduff, Tr. 362-64).

Anderson categorically denied ever talking to Netelkos about Orvis' hypothecation of securities (Tr. 2579). (*Contra* Netelkos, Tr. 1976-79). He testified that Sloan and Netelkos "were going to have absoulte control of the firm at his expense (Tr. 2584). Anderson had many disputes with Netelkos (Tr. 2587).

Anderson testified that he was instrumental in bringing various capital investors into Orvis Brothers: capital accounts of his uncle and aunt valued at $400,000 (Tr. 2589), and 40,000 shares of registered ICC stock valued at two million dollars invested in Orvis by Anderson's wife (Tr. 2593-2594).

In June of 1969, Anderson's wife asked that the shares be returned to her (Tr. 2595). At that time the shares

were in Anderson's own capital account and, after some argument with other Orvis partners, it was agreed that the 40,000 shares would be removed from Anderson's account and placed in his wife's subordinated lender account along with an additional 10,000 shares (Tr. 2602). In return, Anderson's wife agreed to sign a promissory note of $385,000, guaranteeing that Anderson's deficit in his capital account—caused by removing the 40,000 ICC shares—would be paid (Tr. 2603). Finally, Anderson testified that when Orvis went out of business the liquidator sold out his wife's subordinated loan account, resulting in a "total loss" to her (Tr. 2629).

Anderson denied ever reading the goodbody report (Tr. 2631). He also claimed that he had nothing to do with the August, 1969 audit of Orvis by Haskins & Sells; never had any personal contact with Sturgis, Vayda or Taggart, and was not in the office on October 15, 1969 when the X-7A-5 financial questionnaire was discussed (Tr. 2632-2633). (*Contra* Kilduff, Tr. 412; Vayda, Tr. 1322).

On cross-examination, Anderson admitted that three weeks after the Exchange had first found Orvis in violation of the capital ratio rules, in December 1969, he had transferred the 40,000 shares of ICC stock from his own personal capital account, returning them to his account in March of 1970 (Tr. 2634-2635). Anderson also admitted that he initially withdrew $53,075 from his personal Orvis Brothers account on August 25, 1969—the day before the auditors arrived at the firm—but reversed the entry the very next day and did not actually remove the money until September 3, or three days after the closing date of the audit (Tr. 2641-2643). Finally, Anderson admitted that in December of 1969—at the very time the Exchange first found Orvis to be in violation of the capital ratio rule—he placed $69,000 worth of stock in his capital account and removed it the very next month (Tr. 2653-2654).

Anderson also admitted that, at the time Orvis ceased doing business in June of 1970, his personal capital account had a debit balance of $372,000 because of his wife's decision to have the 40,000 shares of ICC stock returned to her (Tr. 2667).

Anderson testified that between himself and his wife he had close to a million dollars invested in Orvis Brothers and was the single biggest capital contributor (Tr. 2669-2670). Nevertheless, he argued that, by June of 1969, his powers had been severely undercut and that he was merely the "titular" head of the Executive Committee (Tr. 2676).

Anderson maintained that he always believed that the Fund of Letters account was being treated properly on the Orvis books (Tr. 2181). (*Contra* Kilduff, Tr. 309). He saw nothing wrong in his decision to open the account without securing the approval of a second Orvis partner, even though he could not recall a similar situation (Tr. 2682-2683). He admitted that the Executive Committee did not discuss the account until May of 1969, some seven months after Anderson had opened it (Tr. 2684-2685).

Anderson testified that, although he and Sloan met with Clinton in Memphis, Tennessee in August of 1969, Anderson's conversations with Clinton were limited to discussing a convertible bond issue (Tr. 2690). (*Contra* Clinton, Tr. 2188-93). Anderson denied ever hearing the conversation wherein Sloan told Clinton that Clinton "owned" Orvis Brothers (*Contra* Clinton, Tr. 2188-93). Anderson denied that Clinton had ever said to Sloan that Clinton Oil did not have a pension fund (Tr. 2691). (*Contra* Clinton, Tr. 2188-93). He stated that he saw Sloan and Clinton shake hands concerning the 80,000 share trade and say "it's a deal" (Tr. 2692). Anderson also stated that Sloan later confirmed the deal.

Anderson said that at no time was he a "power" in the firm (Tr. 2696). Nevertheless, he admitted to being on various special committees while at Orvis Brothers and even after he had supposedly been relegated to "titular" status (Tr. 2700, 2702, 2706; GX 50D).

Finally, Anderson admitted on cross-examination that he was satisfied with Kilduff's performance at Orvis Brothers and that, although he was not satisfied with Sloan, he had nominated both Sloan and Kilduff to serve another year as, respectively, managing partner and financial partners in 1970 (Tr. 2707-2709). *Anderson admitted that Sloan also nominated him for another term as Chairman of the Executive Committee.* At the time of the Orvis liquidation, Anderson was on the liquidation committee, along with Eucker, Villani, Sloan and Kilduff Netelkos was not a member of the Committee (Tr. 2718-2719).

John J. Villani testified that while he was on the Executive Committee—from February 1969 to February 1970—he never learned that Orvis was in violation of the capital ratio rule until the Exchange so notified Orvis in December of 1969 (Tr. 2735-2736). Villani added that it was his understanding that the Fund of Letters account was being charged against Orvis' capital (Tr. 2738-2739; GX 19). Villani believed that the 80,000 share trade to the Clinton Pension Fund was a good, binding trade (Tr. 2741). He denied ever being told by Kilduff that the firm's capital ratio was around thirty-to-one (Tr. 2742; GX 26). Villani denied knowing that the X-17A-5 financial report was false (Tr. 2750). According to Villani, there was no Executive Committee meeting between April 15 and May 6, 1969 (Tr. 2768-2769).

On cross-examination, Villani testified that there may have been "spur-of-the-moment" Executive Committee meetings that he did not attend (Tr. 2771). In addition he

testified that the Executive Committee performed important policy functions at Orvis and that Sloan and Anderson were the two major partners (Tr. 2778, 2787).

3. The Schmidt testimony

At one point in his direct examination Kilduff testified that in March of 1971 he had been summoned to testify at the New York Stock Exchange which was conducting a hearing with respect to the failure of Orvis Brothers' (Tr. 456). Kilduff admitted that he lied to the NYSE examiners on his first two visits there concerning his knowledge of the capital ratio and the fact that Orvis was over twenty-to-one (Tr. 458). Beginning with his third visit, Kilduff, became aware that further lying would be hopeless when the Exchange showed him the thirty-to-one capital computation which he had prepared (GX 26). At that point he decided to tell the whole story and he "stopped lying" (Tr. 460-461).

During Kilduff's first three appearances at the NYSE he was represented by Peter Schmidt, an attorney for Orvis Brothers. Kilduff stated that after he had been confronted with the document he had prepared showing the thirty-to-one capital ratio, Schmidt asked for a recess. At that point Kilduff broke down and admitted to Schmidt that he had been "propping up the capital" and that "the only thing now was to just tell the truth, the whole story as it was" (Tr. 462-462a). On cross examination Kilduff stated that he told Schmidt that he was, in fact, responsible for various false entries. However, Kilduff categorically denied ever saying to Schmidt that the other partners, such as Anderson, knew nothing about what Kilduff had done. Kilduff made very clear that, although he actually made the false entries, the other defendants knew about them (Tr. 618-620).

Defense counsel then called Schmidt to testify. Schmidt stated that he was counsel to Orvis Brothers and, as such, represented Kilduff on three occasions at the NYSE proceedings. According to Schmidt, during the third visit to the Exchange Kilduff was warned by the examiner that the Exchange had "very serious questions" about Kilduff's credibility (Tr. 2456-2457; Anderson BT). The examiner added that "things would be a lot easier for Mr. Kilduff if he involved the others and it would be very difficult for Mr. Kilduff if he did not." Schmidt added that, at that point, a recess occurred and that Kilduff was "very upset" (Tr. 2458). According to Schmidt, Kilduff started crying at Schmidt's office and stated that he was "very embarrassed" and was upset as to what "the others"—Anderson and Sloan—would think of him when they found out what he had done (Tr. 2459-2460). Schmidt told Kilduff to tell the truth but Kilduff told Schmidt that even if he did, the Exchange "won't believe me", adding that "I did it and I did it alone." Kilduff stated to Schmidt that "I did it because I tried to save the firm"; that the other partners "were too dumb" to understand what he did; and that they did not know about what he had done (Tr. 2460).

On cross examination, Schmidt admitted that, at the time Kilduff conferred with him, "he was upset, embarrassed and emotional" (Tr. 2464).

The next day the Court, *sua sponte*, decided to recall Schmidt to the witness stand and ask him certain questions outside the presence of the jury (Tr. 2604). The Court attempted to determine whether Schmidt's testimony was that Kilduff was told he would get a better deal if he testified against the others or whether Kilduff was merely warned against perjuring himself by lying to protect the others (Tr. 2604-2614). The Court satisfied itself that, contrary to the "implication [Schmidt] gave

yesterday" before the jury, only the latter had occurred (Tr. 2613). In point of fact, the Court, outside the presence of the jury, made clear that it had serious questions as to the veracity of Schmidt's testimony (Tr. 2724). The Court also asked Schmidt for the notes which he had referred to during the previous day's testimony (Anderson's BT) but Schmidt replied that "I can't find them. . . . I did throw away a lot of Orvis papers yesterday when I got back to the office. I don't think that is in it. I might still have the notes" (Tr. 2611).*

ARGUMENT

POINT I

Anderson was properly sentenced to a term of imprisonment upon his conviction for conspiracy.

Anderson seeks to upset the sentence of imprisonment for a year and a day which was imposed upon him by the District Court based on his conviction on Count One, the conspiracy count in this case.** The starting point of Anderson's argument is the conspiracy statute, 18 U.S.C. § 371, under which he was convicted. That statute provides a maximum penalty of five years imprisonment or a fine of $10,000, or both, unless the object of the conspiracy is merely a misdemeanor, in which case the penalty cannot exceed the maximum penalty for that misdemeanor. Attempting to invoke that last provision, Anderson tries to demonstrate that the object of the conspiracy in this case was only a misdemeanor. To reach that result, Anderson argues that the object of the con-

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* Schmidt subsequently informed the Court that the notes had accidentally been thrown away.

** Anderson was convicted of conspiracy, under 18 U.S.C. § 371, to violate 15 U.S.C. § 78ff(a), § 78q(a) and 17 C.F.R. §§ 240.17a-3. 4 and 5.

spiracy was the violation of SEC regulations, 17 C.F.R. §§ 240.17a-3, 4, and 5, rather than the statute under which those regulations were promulgated, 15 U.S.C. §78q(a). Anderson then contends that he satisfied the "no knowledge" provision of 15 U.S.C. § 78ff(a)* and therefore could not be imprisoned for a violation of the SEC regulations. Relying on the definition of a misdemeanor contained in 18 U.S.C. § 1, he concludes that the object of the conspiracy was a misdemeanor and under the provisions of § 371 he cannot receive a sentence in excess of the punishment prescribed for that misdemeanor, namely, a fine of $10,000.

The crucial premise of Anderson's argument is that the object of the conspiracy was a misdemeanor. This contention cannot withstand scrutiny. In fact, the conviction in this case was for conspiracy to violate two statutory sections, to which the "no knowledge" provision is inapplicable and which therefore cannot be claimed to be misdemeanors. The statutes involved here are 15 U.S.C. §§ 78ff(a) and 78q(a).

Section 78ff(a) is the penal provision of the Securities Exchange Act of 1934. It creates criminal liability for certain conduct and sets forth the criminal penalties for such violations. In addition to a general clause proscribing any willful violation of the 1934 Act or the regulations promulgated thereunder, there is a specific provision creating criminal liability for the filing of any false or

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* That portion of § 78ff(a) reads as follows:

> "[N]o person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

Anderson, however, ignores the remainder of the statute which eliminates "no knowledge" as a defense. See p. 44, *infra*.

misleading statement in a report where such report is required to be filed.* That portion of § 78ff(a) provides as follows:

> "Any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both. . . ." **

It is clear that the object of the conspiracy in this case was the violation of this criminal statute, even without regard to the specific provisions of 18 U.S.C. § 78q(a). Section 78ff(a) was among the objects of the conspiracy listed in the indictment. Furthermore, as this case was submitted by the District Court to the jury, all of the elements of this portion of § 78ff(a) were charged as the object of the conspiracy which the jury was required to find in order to convict. Namely, the jury had to find as

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* The specific prohibition of § 78ff(a) against false statements is a separable crime apart from any other provision of the 1934 Act. *See generally,* Herlands, "Criminal Law Aspects of the Securities Exchange Act of 1934," 21 Va. L.R. 139, 183-190 (1934); Matthews, "Criminal Prosecutions Under the Federal Securities Laws and Related Statutes: The Nature and Development of SEC Criminal Cases," 39 Geo. Wash. L.R. 901, 906 (1971).

An analogous provision is found in the penalty section of the gun control statute, 18 U.S.C. § 924(a) which sets forth penalties for violations of the chapter, but in addition specifically prohibits false statements. The prohibition against false statements has been upheld as a separate crime. *United States* v. *Sullivan,* 459 F.2d 993 (8th Cir. 1972).

** Since the indictment in this case, the maximum penalty was increased from two to five years imprisonment. Section 27(b) of the Act of June 4, 1975, 89 Stat. 163.

the conspiracy's object the willful and knowing filing of a report required to be filed, which report contained false or misleading statements. The jury could not possibly have found Anderson guilty of the conspiracy count pursuant to the Court's charge without having found each of those elements as part of the object of the conspiracy.* Accordingly, having been found guilty of a conspiracy to violate that provision of § 78ff(a), the conviction was

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* The redacted indictment set forth two objects of the conspiracy: the making and keeping of false records in violation of Rules 17a-3 and 17a-4, 17 C.F.R. §§ 240.17a-3 and 4, and the filing of a false and misleading statement in reports required to be filed with the S.E.C. in violation of Rule 17a-5, 17 C.F.R. § 240.17a-5. Only the latter object necessarily entailed a violation of the portion of § 78ff(a) which prohibits the filing of false reports which are "required to be filed." However, as the Court charged the jury, they did not have the option of finding a conspiracy with either object. He charged that *one* object had to be found and that object included at least the false filing. The Court charged "*the* basic unlawful object of the conspiracy" to be "deceptive record keeping and deceptive filing with the SEC" and a conspirator had to have "deliberate intent to further *that* unlawful objective" (Tr. 3032) (emphasis added). Whenever the Court described the object of the conspiracy it was stated to be a single object of which the false filing was a necessary part (Tr. 3074, 3075, 3028). Most important, the Court charged the jury that: "You can't very well have found a conspiracy to exist without having concluded that the questionnaire was filed in furtherance thereof" (Tr. 3036). Under this instruction the jury was precluded from finding anything less than that the object of the conspiracy was to file a false questionnaire, X-17A-5 (a report "required to be filed")—an offense specifically prohibited by § 78ff(a).

Far from denying it, Anderson concedes that he was convicted for conspiring to violate 15 U.S.C. § 78ff(a), among other provisions (Anderson's Brief at 30).

based on a statutory section as to which the "no knowledge" provision cannot be invoked.*

Although § 78ff(a) entirely removes the lynchpin of Anderson's argument, his contention would nevertheless be defeated on the ground set forth by Judge Knapp in his decision. The object of this conspiracy included a violation not only of § 78ff(a), but of § 78q(a), as well. Anderson attempts to avoid that conclusion by arguing that § 78q(a) contains no criminal standard which can be violated, and that the crime exists only by reference to the regulations promulgated thereunder.

Section 78q(a) provides, with respect to the filing requirement, that brokers must "make such reports" as the SEC requires. The regulation promulgated thereunder, Rule 17a-5, requires the filing of the X-17A-5 report and sets forth in great detail the information to be contained therein.

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* The underlying invalidity of Anderson's position is further demonstrated by the affidavit which he submitted in his attempt to make the requisite showing under the "no knowledge" provision. His affidavit states that he "did not know what information was required to be sent" to the SEC and that he was "not familiar and had no knowledge of Rules 17a-3, a-4 and a-5. . . ." In passing, the Government would urge that this Court should not interpret the "no knowledge" provision to be satisfied by a showing such as this, where a defendant merely denies knowledge of the content of a rule rather than denying that he knew his conduct was contrary to law. See *United States* v. *Schwartz*, 464 F.2d 499, 509 n.16 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972); *United States* v. *Lilley*, 291 F. Supp. 989, 992-993 (S.D. Tex. 1968); Matthews, "Criminal Prosecution Under the Federal Securities Laws and Related Statutes," 39 Geo. Wash. L.R. 901, 957-58 (1971). However, in any event, Anderson was convicted for conspiracy to file a false and misleading report with the SEC. To file a false and misleading report with the SEC, knowledge of the lengthy requirements for the contents of a X-17A-5 would be wholly irrelevant.

It was not claimed in this case that Anderson failed to file some particular item called for by the rule. Rather the conspiracy was to file a *false* and *misleading* report with the SEC. In such a case the statute requiring the filing of reports, § 78q(a), is itself violated by the false filing, entirely without reference to the rule specifying the particular items to be included in the report.* It was this general standard of conduct which, as the District Court pointed out, the jury found Anderson conspired to violate (Opinion, July 1, 1975 at 6). The "no knowledge" provision is inapplicable to a violation of either § 78q(a), or § 78ff(a) and, accordingly, Anderson's term of imprisonment should be upheld by this Court as correctly imposed.**

POINT II

The evidence was more than sufficient to support the jury's verdict that Anderson was guilty of conspiracy. The Court's conspiracy charge was proper.

Anderson claims that there was "no evidence" of his guilt of the conspiracy charged in this case. Interwoven with that claim is the assertion that the Court's instruc-

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* Section 7 of the 1934 Act, 15 U.S.C. § 78g, which refers to rules and regulations to be prescribed by the Board of Governors of the Federal Reserve System, has been upheld as a sufficiently definite criminal statute without reference to the contents of those rules and regulations. *United States* v. *McDermott*, 131 F.2d 313 (7th Cir. 1942), *cert denied*, 318 U.S. 765 (1943). *But see United States* v. *Guterma*, 189 F. Supp. 265, 275 (S.D.N.Y. 1960).

** Although the Court need not reach this issue, the District Court in its opinion suggested a further reason for upholding the prison sentence in this case. The language of the "no knowledge" provision makes its benefits available only where a defendant is subject to imprisonment "under this section" [78ff(a)]. In a case such as this one, where imprisonment is to be imposed under 18 U.S.C. § 371, the "no knowledge" provision is unavailable by its own terms.

tions to the jury permitted a conviction on evidence merely of Anderson's silence at a partner's meeting. In making both of these arguments, Anderson has distorted the record in this case. If all relevant portions of the Government's proof and the Court's charge are considered, there can be no doubt that the jury's verdict was well-founded in the evidence and that the Court's charge to the jury was correct.*

A. The evidence against Anderson

In assessing the sufficiency of the evidence, the standard for review is whether the jury could fairly find the defendant guilty beyond a reasonable doubt, granting full leaway to the jury's right to assess credibility, to weigh the evidence, and to draw reasonable inferences. *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972). *See also United States* v. *Wiley*, Dkt. No. 75-1082, slip op. at 5213 (2d Cir. July 29, 1975); *United States* v. *De Garces*, Dkt. No. 75-1013, slip op. at 4016 (2d Cir. June 13, 1975); *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States* v. *Carneglia*, 468 F.2d 1084, 1087 (2d Cir. 1972); *cert. denied sub nom. Inzerillo* v. *United States*, 410 U.S. 945 (1973). In reviewing sufficiency after a verdict of guilty, the evidence must be viewed in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *D'Avanzo*, 443 F.2d 1224, 1225 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971); *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denie sub nom. Corallo* v. *United States*, 375 U.S. 835 (1963).

* Anderson conveniently ignores the fact that the jury which convicted him—allegedly because of the Court's erroneous charge—was the same jury which, after considering all the evidence, acquitted the defendant Villani on the conspiracy count, based on the same instructions of law.

The thrust of Anderson's argument is that the evidence was insufficient to justify a finding that he participated in the conspiracy.* To make this argument, Anderson presents his sufficiency point as though the only proof adduced against him was his silence at a general partners' meeting, his acceptance of capital from new partners and his "rejection" of Gamelson's stock. (Anderson's Brief, 36-40). Contrary to this selective view of the evidence, there was ample proof that Anderson knowingly joined and participated in the conspiracy to file a false report with the SEC. Especially damaging to the Anderson claim of "silence" is the testimony of Clinton, Gamelson and Smith concerning Anderson's visit to Memphis on August 20, and the subsequent visit of Gamelson and Smith to Orvis a few days later.

The evidence at trial was overwhelming that during the period of the conspiracy alleged in the indictment Anderson was a key man at Orvis Brothers, second in importance only to Sloan (Tr. 805, 877, 1774, 2064, 2787).

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* Although Anderson also cites cases on the requisite degree of knowledge (Anderson's Brief at 47), any claim of lack of knowledge at this stage is frivolous. This is not a case where knowledge had to be inferred from circumstancial evidence. Direct evidence was available through Kilduff, who testified that he repeatedly told Anderson of the steps he was taking in falsifying the books to prop up capital (Tr. 209, 267, 309, 289-290, 309-10), and Netelkos, who testified that Anderson was aware of the effect of improper hypothecation on the Orvis books (Tr. 1978-79). Furthermore, Anderson attended a meeting with the Haskins & Sells accountants where the substantially false X-17A-5, to be filed with the SEC, was reviewed line by line (Tr. 412, 1322). In the face of this evidence alone, a lack of knowledge cannot be argued. On the requisite intent with respect to conspiracies to violate the securities laws, *see United States* v. *Schwartz*, 464 F.2d 499, 508-10 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972); *United States* v. *Peltz*, 433 F.2d 48, 54 (2d Cir. 1970), *cert. denied*, 401 U.S. 955 (1971).

Furthermore, Anderson mistakenly argues that, under 18 U.S.C. § 371, knowledge of a federal nexus must be established. The law is to the contrary. *See United States* v. *Feola*, 420 U.S. 671 (1975).

Anderson's power was based on the fact that he was the largest capital contributor to the firm at that time, with over $1,000,000 invested in Orvis (Tr. 14, 107, 141, 1516; GX 2A), and was the firm's contact to Robert Vesco, who also had invested a substantial sum in Orvis. (Tr. 141, 207; GX 2A). Furthermore, he was chairman of the executive committee (Tr. 133a; GX 8) and the partner in charge of underwritings, the profit center of the firm (Tr. 113a).

In 1968 and early 1969, Orvis was having financial difficulties and the capitalization of the firm was discussed as a source of concern at partners' meetings. (Tr. 149). Around March and April of 1969, the partners expected auditors to be arriving at any time and there was concern about the sufficiency of firm capital. (Tr. 157). In a March, 1969 executive committee meeting, which Anderson attended, Sloan told Kilduff to include $797,100 due as commissions, but yet unpaid, in the firm's profit and loss statement in order to make firm capital look better. Anderson did not object. (Tr. 191). Sloan also told Kilduff at an executive committee meeting in March, which Anderson attended, that 4000 shares of Clinton Oil should be placed in the firm trading account without posting their cost—also to shore up the appearance of capital on the books. (Tr. 267).

It can be argued that as of March the conspiracy was formed, Anderson had knowledge of it, but that he had not yet joined. However, the next month Anderson clearly joined by affirmative, vocal action. In an executive committee meeting in April 1969 Kilduff told Sloan, Anderson, Eucker and Villani that the firm's capital ratio was 30 to 1. There was discussion of what was already being done by way of fraudulent bookkeeping entries to "prop up" capital (Tr. 209). Sloan and Anderson told Kilduff that he should just make sure the firm stayed in business,

keep the doors open. (Tr. 209). In so doing Anderson, as the "number 2 man in the firm," ratified the falsifications of capital which Kilduff had already undertaken on Sloan's instructions and clearly authorized further fraudulent acts along the same lines.*

After this April meeting, no one on the executive committee told the general partnership of the 30 to 1 ratio; the monthly computation of the ratio sent to the general partnership falsely reflected a ratio within the 20 to 1 requirement. (Tr. 214, 216; GX 27). The discussion of the 30 to 1 ratio which took place at the April executive committee meeting was not included in the minutes of that meeting which were circulated to the general partnership. (Tr. 221). The evidence reflected that either Anderson or Sloan was responsible for reviewing the minutes circulated to the general partnership (Tr. 124, 145; GX 11). From this moment on, the co-conspirators were engaged in a plan to hide the true financial condition of the firm from anybody and everybody—general partners, lenders and, most importantly, the SEC and NYSE.

After April, 1969, and even after the arrival of the Haskins & Sells auditors in August, 1969, Kilduff continued falsifying Orvis' books to improve the appearance

* Although Anderson's brief on the sufficiency point omits any reference to the mid-April meeting and Anderson's statement to "keep the doors open," at trial this matter was of no small moment. Indeed, Anderson went to great lengths to try to convince the jury that such a meeting never occurred, and if did, Anderson was not there. The jury apparently resolved the issue of fact on this point against Anderson. It should be further noted that although Villani was also placed at this crucial meeting, unlike Anderson, Villani did not vocally authorize Kilduff to do anything; Villani was not in a position to be telling Kilduff what to do. The jury's verdict of acquittal as to Villani may be explained, in part, by this.

of the firm's capital position. Prior to the arrival of the Haskins & Sells auditors, *Anderson knew precisely what falsifications were on the books.* At an August 1969 executive committee meeting Kilduff reviewed with Sloan, Anderson, Eucker, and Villani his efforts to date, including the use of the $797,100 receivable as current capital; the use of 4,000 shares of Clinton Oil as capital without posting their cost; the use of an additional 5000 shares of Clinton Oil as capital, also without posting their cost; the posting of four bad debt accounts as cash accounts when they were long past their settlement dates and should have been charged against the firm capital. (Tr. 267-68, 289-90, 309-10). The latter item included the Fund of Letters account, by far the largest of the four bad accounts, and one with which Anderson was thoroughly familiar.*

Orvis' need for substantial capital in order to stay in business was revealed for the first time to the general partnership on August 20, 1969 at a meeting at the New York Athletic Club. (Tr. 342, 1441). Two days later Anderson accompanied Sloan to Memphis to try to squeeze

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* In the Spring of 1969 there was general concern among the partnership about the $400,000 debit in the Fund of Letters account—a transaction for which Anderson was concededly responsible and with which he was intimately familiar (Tr. 303, 2468-2533). The trade was first posted on the books in October 1968 but was not charged against capital when it was not paid (Tr. 305, 308, 311).

The Fund of Letters transaction established Anderson's complicity in the false statements to the SEC relating thereto as well as that aspect of the conspiracy the object of which was a violation of Reg T. For purposes of narrowing the conspiracy count, the District Court deleted the allegations relating to Reg T. (Tr. 2303-04, 2307-08). The Fund of Letters transaction was submitted to the jury only with respect to the related false statement in the X-17A-5 filed with the SEC.

Clinton to invest more money in Orvis. At a table with Anderson present, Sloan told Clinton that Orvis was in deep financial trouble; that Clinton in effect owned Orvis; and that Clinton had no choice but to put more money into the firm (Tr. 2190).

The appeal to Clinton backfired. Rather than sending more money, Clinton sent Gamelson and Smith to New York for an unannounced inquiry into the state of Orvis' finances. (Tr. 1160) When Gamelson and Smith arrived at Orvis, they were directed to Anderson, to whom they posed their inquiries about the financial condition at Orvis. (Tr. 1165) *Anderson deliberately misled them, telling them that there was no problem with the firm's capital ratio* (Tr. 1164). He reassured them in a "half dozen ways." (Tr. 1255). A call was put through to Sloan, who concurred. (Tr. 1255). To further convince Gamelson and to keep him happy, Anderson returned to Gamelson stock which he had previously invested in the firm, telling him that Orvis did not need it. (Tr. 1164).

At the end of August Anderson withdrew $53,075 from his personal account at Orvis. The next day, with the auditors arriving momentarily, he reversed that transaction leaving the funds in the account. On September 3, 1975, after the audit cut-off date of September 1, the funds were withdrawn. (Tr. 2641-43, 2653-54). The auditors accounting, which would include transactions through August 31, 1969, therefore included the $53,075 in the computation of capital.

In September Anderson learned from Kilduff that $500,000, sent to Orvis by Clinton as a payment of commissions, was placed in the firm trading account to further inflate capital. (Tr. 362-64). Anderson was also informed of the transfer of Clinton Oil shares from Rick Clinton's subordinated loan account into the account reflecting the non-existent $797,100 debit. (Tr. 247-48).

In October the Haskins & Sells audit was completed. The auditors finished preparing the X17-A-5 questionnaire to be filed with the NYSE and the SEC. It was undisputed at trial that the questionnaire reported materially false information, drawn from the books of Orvis, which contained the various fraudulent entries designed to inflate the firm's capital. Anderson reviewed that questionnaire with the auditors, line by line, on the day before it was actually filed. (Tr. 412, 1322). The testimony of Netelkos further confirmed that Anderson knew that the questionnaire was false. In early 1970 when Netelkos attempted to question Anderson about items on the questionnaire, Anderson told him not to waste time with those figures—they were not true. (Tr. 1970, 1978, 1982). Again when confronted by Netelkos on the fraudulent practices, specifically, the wrongful hypothecation of customer securities, Anderson said, "If it stops, the firm goes out of business." (Tr. 1989). When Netelkos advised Anderson that the Orvis Executive Committee should be made aware of the improper hypothecation, Anderson warned that "I recommend that you don't do that" (Tr. 1982).

Thus, in summary, on the evidence before it a jury was entitled to conclude that Anderson knew of the false entries on Orvis' books from March forward; that he ratified Kilduff's earliest falsifications and authorized Kilduff to undertake the further falsifications, of which he subsequently became aware; that he was fully aware that auditors would be examining the firm's books and their findings would be reported to the NYSE and the SEC; that he reviewed the questionnaire with the auditors realizing full well that it contained substantially false information and nevertheless deliberately allowed it to be filed; and that Anderson's motive was to keep Orvis operating in order to protect his own substantial investment in the firm.

Anderson attempts to side-step the evidence against him by saying that the proof adduced did not relate to a conspiracy to file a false report with the SEC, but rather to some unrelated and uncharged conspiracy to "cover-up." (Anderson's Brief at 39). This claim ignores the charges of the indictment which alleged that "the defendants . . . did engage in a course of conduct to fraudulently conceal the true financial condition of Orvis." Indictment, ¶ 7(a).* It is meaningless in this case to attempt, as Anderson does, to separate a conspiracy to "cover-up" from a conspiracy to file false statements with the SEC. In fact, the ventures were one and the same. The books and records were falsified not as an end in itself but as a means of preventing the auditors, and ultimately the regulatory authorities, from learning the true financial condition of the firm. Likewise, it was crucial to the scheme that general partners and investors, like Clinton and Gamelson, be kept in the dark.**

In this context, the evidence of Anderson's complicity with his co-defendants in concealing Orvis' true financial condition was probative evidence of his participation in this conspiracy. This Court has stated that where the conspiratorial agreement includes concealment, acts of concealment can be considered as committed in furtherance of the conspiracy. *United States* v. *Freeman*, 498 F.2d 569, 575 n. 10 (2d Cir. 1974). *See also Ingram* v. *United States*, 360 U.S. 672, 679 n. 10 (1959); *United*

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* This allegation remained in the redacted indictment as paragraph 4(a).

** Although the general partners learned of the substantial need for capital on August 20, 1969, they were not told that the firm was outside the twenty to one capital ratio until December 1969, at which point the NYSE restricted Orvis' operations. Even at that time, the NYSE and the general partners did not suspect fraud. (Tr. 424-29).

States v. *Franzese*, 392 F.2d 954, 964 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969). In *United States* v. *Colasurdo*, 453 F.2d 585, 592 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), this Court reviewed a securities fraud where "concealment was the essence of the object of the conspiracy—concealment from the SEC . . . was the very aim of the sham transactions in which the conspirators engaged." In that case a claim was rejected that acts of concealment were insufficient to establish the conspiracy. The Court stated that "concealment was not only essential to the success of the scheme but was the very heart and object of it." 453 F.2d at 593.

In claiming that proof of a "cover-up" was insufficient, Anderson also argues that his silence was not evidence of participation in the conspiracy. Anderson is asserted to have been merely present at the scene of the crime and his silence is claimed to fall short of an affirmative act. Although presence and guilty knowledge are insufficient, "evidence of an act of relatively slight moment may warrant a jury's finding participation in a crime." *United States* v. *Garguilo*, 310 F.2d 249, 253 (2d Cir. 1962). *See also United States* v. *Sisca*, 503 F.2d 1337, 1343 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States* v. *Terrell*, 474 F.2d 872 (2d Cir. 1973); *United States* v. *Ragland*, 375 F.2d 471, 478 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968) ("mere presence . . . may be sufficient to base an inference of complicity when such presence facilitates . . . or permits . . . the unlawful act").

The Government contended that Anderson's conduct in remaining silent under certain circumstances was evidence of his participation in the conspiracy, and could be considered by the jury as such. Thus, for example, Anderson's silence at numerous meetings when Kilduff reviewed the fraudulent entries in Orvis' books cannot be characterized as "mere presence." Within the circumstances of

this case, where Anderson was the "number 2 man" at Orvis and such repeated meetings occurred, Anderson's silence was no less than tacit approval. Such approval constituted ongoing acts in furtherance of the conspiracy. Likewise, Anderson's silence at general partners' meetings and at the conference with the accountants when information which he knew to be false was conveyed, was further evidence of participation. Silence where there is a duty to speak is evidence which may be considered on the issue of participation. *See United States* v. *Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974).*

Although Anderson's acts in remaining silent were evidence of his continuing participation in the conspiracy, the Government did not rely only upon those acts in proving its case against Anderson. Two-specific examples of Anderson's affirmative action completely rebut his erroneous claim that he was convicted of conspiracy by his silence. First, Anderson joined the conspiracy in April 1969 by the vocal instruction to Kilduff to do whatever had to be done to keep the firm open. This was spoken by Anderson, as the second most powerful partner, after Anderson already knew of the two falsifications of the books which Kilduff had previously undertaken. In giving this instruction Anderson promoted the venture and made it his own. *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). On the basis of that

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* The unstated premises of Anderson's argument is that silence is less than an affirmative act. However, it is clear that silence may constitute an affirmative act for which the defendant is held responsible. For example, silence may be deemed to be an admission. *United States* v. *Wiley*, Dkt. No. 75-1082, slip op. at 5215 (2d Cir. July 29, 1975); *United States* v. *Schroeder*, 433 F.2d 846, 850 (8th Cir. 1970), *cert. denied, sub nom. Allen* v. *United States*, 400 U.S. 1024 (1971); *Campbell* v. *United States*, 269 F.2d 688, 690 (1st Cir. 1959); *Arpan* v. *United States*, 260 F.2d 649, 655 (8th Cir. 1958).

April meeting alone the jury could have found Anderson to be a participant.

More importantly, Anderson attempts to gloss over his conduct with respect to Clinton, Gamelson and Smith. Anderson's trip to Memphis to help Sloan press Clinton for additional money was clear, affirmative action taken in furtherance of the conspiracy. The falsification of the books and the false filing with the SEC could only serve the purpose of keeping Orvis in business if more capital could be found to bring Orvis back from the financial precipice upon which it was teetering. Of course, in squeezing Clinton for money, neither Sloan nor Anderson revealed the substantial falsifications which were already on the books, and which were keeping Orvis in operation long after it should have been restricted or shut down.

If there could be any doubt as to Anderson's intent in failing to reveal the fraud to Clinton, his state of mind received ample expression when Gamelson and Smith came to New York to determine the condition of Orvis' finances and Anderson assured them, repeatedly, that Orvis was in good shape. He told them that the capital ratio was between 12 or 15 to 1, when in fact he had known for at least four months that it was far in excess to the 20 to 1 limit. He said that the auditors were about to arrive and there was no cause for concern, when at the same time he himself saw a need to reverse a personal withdrawal of $53,075 in order to buttress the appearance of capital for the upcoming audit. Finally, Anderson in a grand gesture, returned to Gamelson stock he had invested in Orvis. This last act served its purpose, namely, of convincing Gamelson that Orvis was so financially sound that it did not need his money. This entire display by Anderson, replete with blatant lies, was an unambiguous affirmative act in furtherance of the conspiracy. When confronted by Smith and Gamelson, if Anderson had told

the truth, the lid would have been off, and if Smith and Gamelson then informed the NYSE or the SEC, Orvis would be closed down. The false filing with the SEC would only serve the purpose of the co-conspirators if members of the conspiracy kept up the front when questioned by anyone. Anderson did just that with Smith and Gamelson and his participation in the conspiracy was evident in his doing so.

On the evidence before it the jury could readily find continued participation even without reference to Anderson's ongoing "silence" at partners' meetings, at the accountant's conference or at meetings concerning Kilduff's additional falsifications.* The evidence as a whole showed that Anderson helped to set the conspiracy into motion, to keep it rolling and to make it succeed. The verdict of guilty was amply justified.

B. The Court's charge

The Court's instructions to the jury were proper in their entirety. Anderson cites a variety of passages from the Court's charge, its supplemental instruction, colloquy with counsel, and questions from the jury. When placed in context, no error can be found.

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* Indeed, it should be reiterated that Anderson was far from "silent" in his dealings with Haggerty and Mezzetta, his partners. In September, 1969 when Mezzetta was decided whether to invest additional money in Orvis, Anderson took part in meetings when Mezzetta was assured that "the fortunes of the firm were improving . . ." (Tr. 1755). Anderson himself told Mezzetta that the Fund of Letters account had been paid and that $500,000 was to be arriving from Vesco. (Tr. 1755-56). One month later Mezzetta invested $75,000 in Orvis. (Tr. 1752). Haggerty, who was made a partner in August, 1969 but wisely resigned in January, 1970, was likewise the recipient of assurances from Anderson. (Tr. 1309).

First, Anderson claims error with respect to the Court's charge on the inferences as to participation in a conspiracy which may be drawn from silence. Before giving two examples about bank tellers, the Court charged the jury that the joining of a conspiracy must be willful and intentional:

> "If you become satisfied beyond a reasonable doubt that such a conspiracy did, indeed, exist, you should then consider whether the Government has established, again beyond a reasonable doubt, that Anderson or Villani or both of them were knowing and wilful participants in such conspiracy.
>
> "You cannot stumble into a conspiracy by mistake. A person cannot be guilty of a conspiracy because he associates with others who happen to be so guilty. A person can be guilty of conspiracy only if he knows a common undertaking is underfoot, if he knows that such common undertaking has a particular unlawful purpose, and if he wilfully and intentionally decides to join in the common undertaking for the purpose of furthering that particular unlawful purpose.
>
> * * * * *
>
> "What is necessary and without which one cannot be deemed a conspirator is that he have knowledge of the basic unlawful object of the conspiracy, in this case, deceptive record keeping and deceptive filing with the SEC to conceal financial weakness, and that it was his deliberate intent to further that unlawful objective.
>
> "Obviously it follows from what I have said that knowledge without wilful participation is not enough, nor did either of these defendants have any obligation to stop the conspiracy just because they may have known about it.

> "To repeat, one can only become a conspirator by knowing and wilful participation in the unlawful objective." (Tr. 3030-32)

Thus the Court charged the need to find "wilful participation," carefully cautioning the jury that guilty knowledge was not enough. *United States* v. *Falcone*, 109 F.2d 579, 581 (2d Cir.) *aff'd* 311 U.S. 205 (1940); *United States* v. *Peoni*, 100 F.2d 401, 402 (2d Cir. 1938).

Judge Knapp went on to explain the "limited" circumstances under which silence could further a conspiracy. The court's instructions, not quoted in Anderson's brief were as follows:

> "Now, Mr. Feinberg used some language in his summation which is confusing in the light of the rules I have just laid down.
>
> "He said and he contends that a conspirator can further the conspiracy by silence. Well, in a certain limited extent that is true.
>
> "I am going to illustrate that proposition by an illustration having nothing whatever to do with this case. I do that quite deliberately because if I try to illustrate it by this case, I just couldn't help but make you think that some of the things I am saying are more important than others or I was adopting Mr. Feinberg's argument or something.
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> * * * * *
>
> "Just supposing that we have a conspiracy to steal money from a bank and one member of this conspiracy is a bank teller. In my supposition the bank teller isn't going to do anything, but he is a member of the conspiracy, he knows about it. The conspiracy is going to take place at, say, 2:30 on a given afternoon when he in the normal course of his duties would be at his post.

"The larceny is going to take place at the next post. He knows the conspirators know that if he absented himself from his post there would be trouble at the bank and the scheme wouldn't go through.

"So his part in the conspiracy is to go to his post and say nothing. That is all he has to do in the conspiracy. If he is there fc the purpose of carrying on the conspiracy, and it was the deliberate decision of the conspirators that he has to be there, that his presence is necessary to have him there for the carrying on of the conspiracy, his presence there and his planned silence could be a furtherance of the conspiratorial purpose.

"Let me just change the situation a little bit and show how he is not. He happens to know all about the conspiracy because his brother is in it, but he had no part in it. He knows the robbery is going to take place at that time, but he is not part of it. He is at his place. Because his brother is in it he decides he is going to keep his mouth shut, he is not guilty of anything.

"As far as the law of conspiracy is concerned, that poses no obligation to be your brother's keeper. This hypothetical teller in the second case, he knows all about the conspiracy, he heard all about it from his brother, he has pleaded with his brother to stay out of it, he stands there, he watches the thing go on, he says nothing, he is guilty of nothing. If he is part of the conspiracy and he goes there for the purpose of maintaining his silence so that the conspiracy won't be interrupted, he is part of the conspiracy and can so be considered.

"To sum up, before either defendant can be considered guilty of the conspiracy, he has to have been found a deliberate participant in it." (Tr. 3033-35).

Although Anderson now argues that these illustrations were inappropriate, he raised no such objection to the Court after delivery of the charge. (Tr. 3047-3052). Villani's counsel requested that the Court clarify its example of the non-participating bank teller by explaining that there was no need to try to stop the conspiracy. The Court agreed to charge the jury on that point and did so. (Tr. 3059). Anderson now argues that this illustration "did not cure the error," (Anderson's Brief at 42). However, again counsel for Anderson did not object after this instruction was delivered by the district Court. Thus, if any of these instructions were incorrect in any respect Anderson must show them to be plain error, F.R.Crim. P. 30, 52(b); *United States* v. *Famulari*, 447 F.2d 1377, 1382 (2d Cir. 1971), which they clearly are not.*

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* Anderson next cites an exchange between the Court and the Forelady of the Jury, casting it as though it was a request from the jury on further instructions on the inferences to be drawn from silence. In fact, this dialogue was a request from the Forelady on how to phrase Count 1 in asking the jury for a vote:

> "The Forelady: Your Honor, is there any way in which you can put in a short or simple sentence the substance of Count 1 of the indictment? You know there are pages and pages of it and if I try to ask people to vote on Count 1, is there any way of putting it in a nutshell? Do you see what I mean? Count 2 is on one page and I think I can probably put a question on Count 2, but Count 1 goes all over the place.
>
> * * * * *
>
> "The Court: . . . Well, for the purpose of voting, you just should ask the jury whether they vote guilty or not guilty on the conspiracy count . . . (Tr. 1072-73).

At this point the jury began deliberations. They returned with a question on the issue of knowledge, to which the Court responded. (Tr. 3074). After that instruction Anderson requested the Court to charge that:

> . . . "[h]e must do something affirmative . . . [h]e must take some action evidencing his agreement."

When Judge Knapp heard that request from counsel, he said: "I did say that." The Court had in fact just instructed the jury, as follows:

> "Of course, he has to do a lot more than know. He has to know the conspiracy is underfoot and he has to wilfully and deliberately and everything else I told you decide to participate in it and by his conduct to further its unlawful objectives. (Tr. 3076).

Anderson also claims that at the same time the Court denied his request for a charge that

> ". . . they must find that the objective of the conspiracy was to file this false report." (Tr. 3077).

Again Judge Knapp had charged precisely that immediately before counsel requested that he do so:

> "The indictment charges on conspiracy, namely, a conspiracy which has as its unlawful objective the keeping of false records and the filing of false returns in violation of the securities laws of the United States . . . The unlawful objective of the conspiracy is to keep false records and file false returns or a false return, namely the questionnaire.
>
> "In order to become a part of the conspiracy, any defendant must know—he must do more than

know, as I will come back to it—any defendant must know and subscribe to that basic unlawful objective, namely, the keeping of false records and the filing of a false questionnaire or return."

* * * * *

He does have to know that the objective of the conspiracy is to keep false records and file false returns." (Tr. 3074-75).

Anderson's requests had been entirely superfluous and were denied as such.

At 9:50 P.M. the jury asked the following question:

"Does knowing about the conspiracy and knowing its purpose imply being a member of the conspiracy?" (Tr. 3081, Ct. Ex. 11).

The Court charged as follows:

"*Well, the answer to that question is no.* (Emphasis supplied)

"I can remind you of the illustration I gave of the bank teller, in the one case where he was a member and the other case where he wasn't. In the case where he wasn't a member of the conspiracy he clearly knew about it and he knew its purpose, but he wasn't a member. That illustrates the answer is no.

"What you need for membership of the conspiracy is not only knowledge but a knowing and wilful intention to participate in accomplishing the results, the unlawful results, of the conspiracy, plus activity in furtherance of that result.

"Of course activity in the peculiar circumstances that I defined them to you as in relation

with that bank teller, the one who was a participant, can be purposeful silence under the peculiar situation as the one I stated.

"Does that answer your question?

"THE FORELADY: May I ask something or would it have to be in writing?

"THE COURT: You can ask.

"THE FORELADY: Would knowledge of the conspiracy and knowledge of its purpose and wilful silence——

"THE COURT: Wilful silence——

"THE FORELADY: I mean silence with a purpose, not necessarily a positive act.

"THE COURT: Wilful silence, that is only a, of the conspiracy if it was planned by the conspirators. I mean, for example, take my illustration of the bank teller. If he happened to be a member of the conspiracy, just by hypothesis, and he knew all about it and he just happened to be there, it wasn't planned that he was there and he happened to be there and he happened to see things going on and he did nothing, that wouldn't be an act in furtherance of the conspiracy.

To be an act in furtherance of the conspiracy it has to have been planned for him to be there. Mere happening upon some information and keeping silent about it would not be an act in furtherance of the conspiracy.

"To be an act in furtherance of the conspiracy—silence must be a planned act.

"For example, in this kind of situation one of the other conspirators would have had to have

known he was going to be in some situation where speech was going to be required of him. This would have to be a matter considered by the conspirators or one or more of them. He would have to have planned to be in such and such a place and keep silent in such and such a situation. It can't be just a haphazard thing, where he happens to come upon some information and not say or do anything about it. It would have to have been a planned act. Silence can be an act. It has to be planned in order to be an act. (Tr. 3082-84).

Anderson's attorney objected stating that "I would except to that much of your Honor's charge which does not tell the jury that they must agree that the defendant will go there and be silent and that must be a purposeful act in furtherance of the conspiracy." (Tr. 3084-85). Judge Knapp replied, "I said that very thing." (Tr. 3085) Obviously, Judge Knapp's observation was correct. Nevertheless, the Court gave to the following additional instruction:

"Bear in mind everything I told you. A conspiracy is an agreement. It had to have been planned, it had to have been planned in pursuance of the agreement. That is what you have to find.

"The act of silence, let me put it that way, was planned in pursuance of the original agreement to conspiracy or carrying out of the agreement. I don't mean to say when the conspiracy started they had to have planned everything, but once the conspiracy has started, each act has to be a conscious furtherance of the original plan and agreement in order to constitute an act in furtherance of the conspiracy, in order to constitute evidence of the existence of an agreement so far as that particular individual is concerned." (Tr. 3086).

"If he is not a part of the conspiracy, silence, he has no obligation to try to stop it.

"If what he does is intended by the conspirator to facilitate it, then silence can be an overt act in pursuance of the conspiracy." (Tr. 3091-93)

Anderson's counsel asked that portions of the request not charged be covered. The Court responded that "They have been covered otherwise.' (Tr. 3096).

Clearly, Judge Knapp's charges were correct as a matter of law. Indeed, the Court went to extreme lengths to explain to the jury the requirements of conspiracy. Under the Court's instructions, the jury could only have found Anderson guilty based on his silence if it found that silence to be a planned act taken pursuant to the conspiratorial agreement. This instruction falls within this Court's decision in *United States* v. *Ragland*, 375 F.2d 471, 478 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968), stating that "[m]ere presence . . . may be sufficient to base an inference of complicity when such presence facilitates . . . or permits . . . the unlawful act." It is elemental that the test for participation in a conspiracy is the taking of an act to promote the conspiracy. *United States* v. *Falcone*, *supra*, 109 F.2d at 581; *United States* v. *Terrell*, 474 F.2d 872, 875 (2d Cir. 1973); *United States* v. *Cianchetti*, 315 F.2d 584, 588 (2d Cir. 1963). If the act so taken is silence, that would not matter.

As a whole, the Court's charge carefully cautioned the jury on the need to find wilful participation. *There was ample evidence before the jury of that participation without reference to the acts of silence.* Neverthelss, if the jury found that the conspiracy contemplated fraudulent concealment and Anderson took part in it specifically pur-

suant to the conspiratorial agreement, a verdict on that basis would be justified in law and fact.*

POINT III

The evidence of the hypothecation of fully paid for customers' securities was properly admitted after Anderson's counsel refused to accept the trial court's proposal that such evidence would be excluded if a conspiracy on the part of Sloan, Eucker and Kilduff were conceded.

At trial the Government offered evidence of the hypothecation by Orvis of millions of dollars worth of fully paid customer securities. This evidence was relevant to Count One in two respects. First, it proved an object of the conspiracy as alleged in the indictment, namely, the hypothecation of fully paid customer securities (Indictment, ¶ 2). Second, and most importantly in light of the case that ultimately went to the jury, it constituted evidence of a material false statement to the SEC, in that the X-17A-5 questionnaire falsely stated that such "erroneous" hypothecations had been corrected, when in fact they had not (Indictment, ¶ 5). Likewise, the evidence was relevant to Counts 8 and 9 as proof of the substan-

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* Again, it bears repeating that Villani was acquitted of conspiracy under the Court's charge apparently because the jury found, based on the Court's charge, that even if Villani knew of the conspiratorial object—which Kilduff had testified was the fact —he had done nothing to promote or further it. For example, Villani had said nothing at the April meeting, had not encouraged Haggerty and Mezzetta to invest capital and, perhaps most importantly, had not deliberately misled Gamelson and Smith when they visited Orvis.

tive crimes of false filing and illegal hypothecation, respectively.

Anderson argues that the District Court erroneously admitted the evidence of hypothecation in that the Government failed to prove hypothecation in violation of Section 8(c) and Rule 8c-1. Specifically, it claimed that unless the Government proved that the hypothecation exceeded aggregate indebtedness, the violation would not be shown.*

However, the illegality of the hypothecation under the provisions of Section 8(c) and Rule 8c-1 need not be considered in determining the admissibility of the evidence of hypothecation on the conspiracy count. Early in the trial, the Court determined that it would not send Count 9, the substantive hypothecation count, to the jury.** Thereafter the Court ruled that the hypothecation evidence would be admitted only on the issue of whether there was a conspiracy to file a false report with the SEC (Tr. 1099, 1407-08, 1816-17, 2311). The redacted indictment included only those allegations relating to a

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* To make this argument, Anderson cites the prohibition of subsection (3) of Section 8(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78h(c), and subsection (3) of Rule 8c-1, 17 C.F.R. § 240.8c-1. As Anderson so strenuously argues, those provisions prohibit hypothecation for a sum in excess of customers' aggregate indebtedness. Although that proposition is correct, Anderson incorrectly assumes that subsection (3) is the only limitation on hypothecation. To the contrary, hypothecation of fully paid customer securities, for a sum less than the aggregate indebtedness, is clearly prohibited by subsection (1), which forbids commingling of customer securities without consent. This point is more fully discussed *infra* at 90-100, in connection with Eucker's appeal from his guilty plea to Count 9.

** The Court said that it was doing so to simplify the case, even though the substantive count might, as a legal matter, be properly submitted to the jury (Tr. 983).

conspiracy to keep false records and to file false statements with the SEC.

It is here that Anderson made a calculated decision which, ultimately, backfired. When the trial Court ruled that, for simplicity's sake, hypothecation evidence would be admitted solely on the issue of whether there was a conspiracy to file a false X-17A-5 questionnaire, the Court posed a choice for the defendant: concede the existence of a conspiracy only on the part of Sloan, Eucker and Kilduff and thus bar all testimony and evidence concerning illegal hypothecation, or refuse to concede such a conspiracy existed at all (on the part of anybody) and allow the evidence in (Tr. 1406, 1817-18, 2312). Anderson—looking ahead to the testimony of Schmidt—refused the Court's proposal and the evidence was admitted."

Having admitted the evidence of hypothecation on this basis, in charging the jury the Court carefully delimited the purpose for which the jury could consider it:

> You will also remember the testimony concerning fully-paid securities pledged in error. As such testimony relates to the Government's claim that statements of the correction of customers'

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* Anderson's decision in this regard was undoubtedly based on the hope that Schmidt's testimony would result in his acquittal. Schmidt testified that Kilduff had told him that he acted alone and that none of his partners, including Sloan, Eucker and Anderson, knew of his activities in falsifying Orvis' books (Tr. 2453-61). However, this testimony was easily dismissed as unpersuasive in the Government's summation, since it attempted to deny any conspiracy between Sloan, Eucker and Kilduff in the face of overwhelming evidence to the contrary. Indeed, Judge Knapp observed that as to the guilt of Sloan, Eucker and Kilduff on the conspiracy count, a directed verdict would have been appropriate if such a thing existed in criminal law (Tr. 1091).

fully paid securities loaned and pledged in error was false.

Now let's list some of the things that are not in issue. Taking last things first, there is no claim in this trial that either of these defendants ever had the slightest notion that anyone concerned with Orvis had ever intentionally made an improper pledge of stock.

You will recall that testimony of several Government witnesses that in the nature of the brokerage business errors in the pledging of stock are inevitable.

The sole Government claim in this regard is that the conspirators, not directly either of these on trial, misrepresented their efforts to correct the inevitable errors, thus contributing to the claimed falsity of the questionnaire (Tr. 3040-41).

In so charging the jury the Court was extremely generous to the defendants on trial in negating any possible inferences that the hypothecation was wrongful in itself or that those defendants knew about it.*

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* In view of the Court's instructions, Anderson's claim that the jury could have convicted only on the hypothecation "specification" is absurd. (Anderson's Brief at 57). The jury was charged to consider *this evidence only as it bore on the issue of the existence of the conspiracy to file a false X-17A-5 questionnaire, and not as to Anderson's participation.* Furthermore, Anderson's reliance on *United States* v. *Natelli*, Dkt. No. 75-1035 (July 28, 1975) is misplaced here, and at other points in his brief. In *Natelli* the defendants were convicted of a substantive offense involving two false statements in a proxy statement. Where the evidence was insufficient as to one of the false statements, this Court held the conviction on the charge required reversal. Of course that case has no bearing on a conspiracy charge of the kind given here, which removed from the jury's consideration the very object about which Anderson complains—*i.e.*, unlawfully to hypothecate fully paid for customers' securities (Indictment, ¶ 2). See *United States* v. *Wilner*, Dkt. No. 74-1955 (2d Cir., Sept. 10, 1975).

The Court correctly ruled that the hypothecation was admissible as evidence of the existence of the conspiracy, even if only Eucker, Sloan and Kilduff participated in that particular aspect of the conspiracy. A trial court is given "wide latitude" in admitting evidence tending to establish the existence of the conspiracy *Nye & Nissen* v. *United States*, 168 F.2d 846 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949). Acts of one conspirator are admissible against all the conspirators to show the existence of the conspiracy and its objectives. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Cohen*, 489 F.2d 945, 949 (2d Cir. 1973). *United States* v. *Costello*, 350 F.2d 848, 834 (2d Cir.), *rev'd on other grounds sub nom. Marchette* v. *United States*, 390 U.S. 9 (1968). Furthermore, although the Court did not instruct the jury to consider it as such, the evidence regarding hypothecation was properly admissible against Anderson to show the background and development of the conspiracy of which he was a member. *United States* v. *Torres*, Dkt. No. 74-2303 (2d Cir. July 2, 1975) slip op. 4573, 4580; *United States* v. *Colasurdo*, 453 F.2d 585, 591 and n.3 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972); *United States* v. *Witt*, 215 F.2d 580, 583 (2d Cir.), *cert. denied sub nom. Talanker* v. *United States*, 348 U.S. 887 (1954). In any event, the evidence of hypothecation—as distinct from the evidence of the false statement regarding hypothecation—could hardly have prejudiced Anderson given the lengths to which the trial court went to render it free of any connotation of criminal wrongdoing.

Anderson's contention that the evidence on hypothecation was unconnected to the conspiracy is utterly without merit. His reliance on those portions of the record that show Eucker's personal respnsibliity for the hypothecations is misplaced (Anderson's Brief at 53). Concededly it was as a result of Eucker's conduct in the first instance that the hypothecations of fully-paid customer securities occurred. But Eucker's conduct, designed as

it was to prop up the firm in the face of threatened financial ruin, could hardly be called a frolic of Eucker's own. More importantly, there was evidence before the jury of Kilduff's and Anderson's knowledge and ratification of the statement pertaining to hypothecation filed with the SEC, which statement was shown to be false by the very evidence of hypothecation about which Anderson complains. Thus, Taggart testified he informed Eucker and Kilduff at a meeting prior to the filing of the X-17A-5 of the extent of the problem of Orvis' hypthecation of fully paid customer securities (Tr. 1393). Eucker said at the time that it would be cleaned up. It never was. Indeed, Lanz and Soffler presented evidence that the hypothecation got worse. Nevertheless, at the October 15th meeting with the accountants, no objection was raised by Eucker or Kilduff when the hypothecations were falsely stated to have been "since corrected."

Vayda testified that in December, 1969, he received a letter from Kilduff which appended a memorandum from Eucker, dated September, 1969, admonishing his staff to correct the hypothecation problems (Tr. 1344; GX 141A). This memorandum was sent to Vayda to show, according to Kilduff, that it "covered the points you [Vayda] raised on this subject" (GX 141A). Kilduff's letter was sent over two months after Kilduff and Eucker had sat silently while Haskins & Sells had placed "since corrected" on the questionnaire.

Indeed, the falsity of the statement "since corrected" was shown to have been within Anderson's knowledge as well. Netelkos attested that in March 1970 he confronted Anderson with the X-17A-5, Item 6-G, and told him that he was suspicious of the claim that $5,900,000 of securities pledged in error had been since corrected (Tr. 1975-76). At first Anderson tried to give an explanation but ultimately admitted that the X-17A-5 was false and

he knew it to be so (Tr. 1976-78). Netelkos asked what was going to be done to correct it (Tr. 1978). Anderson answered that the only thing to do was to get more capital (Tr. 1979). Subsequently, when Netelkos told Anderson that the problem had to be presented to the executive committee, Anderson said: "I recommend that you don't do that" (Tr. 1982). The jury could have fairly have inferred from these exchanges with Netelkos (coupled with Anderson's position of authority within the firm and his knowledge of all the other falsifications as of September 1969), that Anderson was fully aware of the falsity of the statement on hypothecation from the time of its filing.

However, even if Anderson lacked such actual knowledge at the time of the filing with the SEC, the false statement would nonetheless be admissible against him, since it constituted one more act in furtherance of conspiracy of which he was a member. Thus in charging the jury to consider the evidence on hypothecation only as the existence of the conspiracy between Sloan, Eucker and Kilduff (and not as to Anderson's knowledge and participation), Judge Knapp granted Anderson an advantage to which he was not entitled.

Finally, Anderson argues that the Court prejudicialy circumscribed the cross-examination of Netelkos, whose testimony imputed to Anderson knowledge of the falsity of the statement on hypothecation in the X-17A-5. The validity of this claim is undercut again by the Court's charge limiting consideration of the hypothecation evidence to the existence of the conspiracy among Eucker, Sloan and Kilduff. However, in addition to that, this claim of error entirely lacks a basis in fact.

A reading of the cross-examination of Netelkos, which consumes over 150 pages of transcript, reveals that

defense counsel was given the widest possible latitude by the District Court. As to the specific matters which Anderson asserts were unduly circumscribed, the record itself refutes his claim. Contrary to Anderson's assertion, Netelkos was repeatedly cross-examined about his control of Orvis (Tr. 2025, 2067-69, 2166-68). Over numerous objections of the Government, defense counsel delved into the underlying facts of the Manor Nursing Home civil injunction (Tr. 2005-06, 2084-2087, 2103-2109, 2147-52). Similarly defense counsel questioned Netelkos about his suspension from the securities industry by a regulatory agency; when the witness denied the accusation and tried to explain, defense counsel cut him off (Tr. 2001-02). Finally, cross-examination as to the underlying facts of a New Jersey indictment was in fact permitted, in one instance, over objection (Tr. 2001, 2012, 2150).*

Cross-examination with respect to the Manor Nursing Home matter, the NASD suspension, and the New Jersey indictment was permitted by the District Court even though the rule in this circuit prohibits impeachment by acts of misconduct not resulting in a conviction. *United States* v. *Miles*, 480 F.2d 1215, 1217 (2d Cir. 1973); *United States* v. *Bowe*, 360 F.2d 1, 15 (2d Cir.), *cert. denied*, 385 U.S. 961 (1966). However, even apart from that, to the very limited extent that any cross-examination on these matters was precluded, the Court was well within its discretion in doing so. A trial court is entitled to prevent defense counsel from "diverting the jury from the issue of . . . guilt" by entering into "a separate fact-finding venture." *United States* v. *Pacelli*, Dkt. No. 75-1153,

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* Defense counsel was permitted to ask, without objection, whether the indictment contained 125 counts (Tr. 2012).

slip op. at 5094 (2d Cir. July 24, 1975). *See also United States* v. *Jenkins,* 510 F.2d 495, 500 (2d Cir. 1975); *United States* v. *Kahn,* 472 F.2d 272, (2d Cir.), *cert. denied,* 411 U.S. 982 (1973).*

POINT IV

Evidence of the Fund of Letters transaction was properly admitted.

There was evidence adduced at trial that in 1968 Anderson attempted to arrange a sale of ICC stock to the Fund of Letters and that the sale fell through in early 1969. Orvis had received the ICC stock from the sellers and paid them, but the Fund of Letters refused to accept delivery of the stock and to pay for it. Under Regulation T, Orvis was required to liquidate the transaction within seven days. Furthermore, in computing the firm's capital ratio, the debit of almost $500,000 should have been a charge against capital. It was undisputed at trial that the account was not liquidated and that it remained unpaid from October 1968 through June 1970, when Orvis shut down. Until the New York Stock Exchange discovered the account in December, 1969 the debit was not charged against firm capital.

Anderson first asserts that the Government changed its theory on the Fund of Letters mid-trial because it found that that transaction did not constitute a violation of Regulation T as alleged in Count One of the Indict-

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* It should be noted that Netelkos was really of so little importance to Anderson that in summation his counsel argued summarily that Netelkos was "one of the biggest knaves you will ever see in your life" and gave him no further attention beyond adding, "I don't think too much time has to be spent on that man" (Tr. 2854).

ment. The contention is simply wrong. The transaction was a gross violation of Regulation T, which requires a broker to liquidate an unpaid cash account within seven days of the settlement date, if it remains unpaid at that time. Section 7 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(g); Section 4(c)(2) of Regulation T, 12 C.F.R. § 220.4(c)(2). Here the evidence established that in the face of the continuing non-payment for the stock, the account remained unliquidated for a year and half.*

Although the allegations of the indictment as to Regulation T were amply proven, the Government also proved that the transaction constituted one of the false statements made to the SEC in the X-17-A-5 (GX 74).** The Court chose to submit it to the jury on the latter issue alone as part of an effort to narrow the presentation of the conspiracy count (Tr. 2303-04, 2307-08, 2441). The defendant can hardly complain of this decision (under which all references to Regulation T were excluded from the redacted indictment), since it deprived the jury of an additional valid basis upon which to find him guilty. *See generally United States* v. *Wilner, supra.* The District Court correctly ruled that the conspiracy charged

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* Anderson's counsel argued unsuccessfully to the District Court that a violation of Regulation T had not occurred with respect to the Fund of Letters account because the ICC stock was unregistered and therefore could not be sold to comply with the regulation. This specific contention was rejected in *Crimmins* v. *American Stock Exchange, Inc.*, 368 F. Supp. 270, 278-79 (S.D.N.Y. 1973), *aff'd*, 503 F.2d 560 (2d Cir. 1974).

** Anderson's claim that this particular false statement was not alleged as such in the indictment is clearly frivolous. There is no requirement that the indictment allege each act committed in furtherance of the conspiracy. *Wong Tai* v. *United States*, 273 U.S. 77, 81 (1927); *United States* v. *Cohen*, Dkt. No. 75-569, slip op. at 4417 (2d Cir., June 26, 1975); *United States* v. *Koss*, 506 F.2d 1103, 1113 (2d Cir. 1974), *cert. denied*, — U.S. —, 95 Sup. Ct. 1565 (1975).

was broad enough to encompass that false statement regarding the Fund of Letters account (Tr. 2364). *United States* v. *Koss*, 506 F.2d 1103, 1113 (2d Cir. 1974), *cert. denied*, — U.S. —, 95 Sup. Ct. 1565 (1975).

Anderson further argues that this evidence was improperly admitted because he did not know precisely how the transaction was recorded in Orvis' books. This claim, which the jury need not have credited at all, is entirely beside the point. The Government proved that Anderson knew in August, 1969, prior to the arrival of the auditors and prior to the filing of the questionnaire with the SEC, that the Fund of Letters account was not being charged against capital. Kilduff testified that he so informed Anderson at a meeting in August when he reviewed the various ways in which capital was being propped up (Tr. 309).

Furthermore, based on additional evidence before it, the jury could properly have inferred that Anderson knew that, long after the requirement to do so had arisen, the Fund of Letters account remained uncharged against capital. By his own admission, Anderson knew by August or September, 1969 that the deal was off and that the Fund of Letters would not buy the stock (Tr. 2518). Yet no instruction was issued at that time to write off the $500,000 loss incurred. Anderson, as the partner who opened the account, was the very person who had the responsibility for issuing such an instruction. Moreover, after Anderson knew the deal was off, he falsely told Mezzetta the account had in fact been paid (Tr. 1755-56).* In February or March, 1970, Anderson told Netel-

* In December, 1969 or January, 1970, Mezzetta insisted at a partners' meeting that the stock in that account be liquidated and requested that his demand be put on the record. The minutes nevertheless omitted reference to Mezzetta's statement (Tr. 1762-64). Of course, neither Mezzetta nor the other partners of Orvis were ever told by Anderson or Kilduff that the Fund of Letters

[Footnote continued on following page]

kos that the money would be collected (Tr. 1983-88). On this evidence the jury could properly have concluded that Anderson knew, throughout the period of the conspiracy, that the Fund of Letters remained open as a cash account long after it should have been both written off and charged against capital.*

The Court admitted the evidence as relevant on this very basis—that is, to show that Anderson knew the Fund of Letters account was not a secured cash account as portrayed to the SEC in the X-17-A-5 (Tr. 1819). Upon defense motions to dismiss, Judge Knapp stated that the jury could properly find that Anderson knew that the Fund of Letters account was fictitious (Tr. 2304). In its charge, the trial court seemingly limited the jury's consideration of the evidence of the Fund of Letters transaction solely as it pertained to the issue of whether Anderson knew of the false statement to the SEC concerning that transaction (Tr. 3039-40). Since the evidence could also have properly been considered by the jury as tending to prove the existence, and acts in furtherance, of the conspiracy charged—irrespective of Anderson's precise relationship to that evidence—the trial court's limiting charge gave to Anderson more than he was entitled.

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debt was not being charged to Orvis' capital. It is for this reason that Zalduondo and the other general partners were in such a continual state of dissatification. They believed that the Fund of Letters account was a substantial drain on Orvis' capital. Anderson's answer to them always was that the account would be cleared up satisfactorily. He never told them, however, that the account was being treated as a cash account.

* Anderson, of course, argued that he always believed the deal would ultimately go through. Whatever the credibility of that assertion, it is no answer to the charge that the item was treated improperly on the Orvis books. Anderson could always have ordered that the debit of $500,000 be properly posted on Orvis' books until the deal with the Fund of Letters was consummated. He never gave such an order.

Similarly, Anderson cannot validly object to Judge Knapp's refusal to charge the jury that they could only find Anderson guilty if the Funds of Letters transaction "was falsely recorded and kept at the insistence of Mr. Anderson or the instance of Mr. Anderson to be filed with the SEC. . . ." First, the request assumed that Anderson could only be found guilty on the basis of the false statement relating to the Fund of Letters account. This assumption, although one that defense counsel was understandably anxious to foist upon the jury, was fallacious. The jury had before it evidence of Anderson's complicity with Kilduff in all of the false entries which fraudulently inflated the firm's capital (Tr. 309).

Second, the request was an inaccurate statement of law. To be culpable with respect to even this limited aspect to the conspiracy, Anderson need not have caused the false entry to be made at his "insistence" or his "instance". His participation in any other way that furthered the conspiracy would obviously suffice. Given the foregoing, Judge Knapp correctly declined to give the requested instruction. As Judge Friendly recently observed, "It is elementary that to put a trial court in error for declining to grant a requested charge, the proffered instruction must be accurate in every respect." *United States* v. *Leonard*, Dkt. No. 75-1153 (2d Cir., Aug. 28, 1975), slip op. 5843, 5851.

Finally, Anderson argues that the Government sought to "exploit" the Fund of Letters transaction to link Anderson with Robert Vesco. This accusation is baseless. The few references to Vesco in the course of this four week trial were made only as required to put relevant evidence before the jury.

Evidence as to Vesco's substantial capital investment in Orvis was relevant to show that Anderson, as Vesco's

contact at Orvis, was an important and powerful member of the firm. Likewise, evidence that Mezzetta's negative report on ICC was quashed by Anderson at Vesco's insistence showed both Anderson's power in the firm, as well as his responsiveness to Vesco's wishes (Tr. 1775-77). It was that responsiveness that explained Anderson's willingness to pay the sellers of the ICC stock and to continue to hold the Fund of Letters account open long after it was clear that the deal had aborted. With respect to the Zalduondo report, (GX 60) and Leavitt's testimony (Tr. 1699-1701), the Government was entitled to prove, through that evidence, that Anderson knew that the Fund of Letters transaction had aborted and that, therefore, Anderson also necessarily knew that it could not possibly be a validly secured cash account. The mention of Vesco in these connections was neither gratuitous nor exploitive.

In any event, any adverse impact which Vesco's name could have conceivably created in a juror's mind was completely overcome by the Court's numerous instructions on that issue. After Vesco was mentioned in the Government's opening the Court told the jury, that "what Mr. Vesco may have—his private or public life may be—don't enter into the issue in this case, as you obviously recognize." [Opening 4/3/75, at 29-31(a)]. Later in the trial, when the records reflecting Vesco's investment in Orvis were received in evidence, the Court instructed the jury, as follows:

> I just want to call your attention to the date, March 31, 1969. I can't tell you here whether I had ever heard of Mr. Vesco at that time or not. I can only tell you this on the basis of reconstruction that if I had heard of him, all I would have known about him was that he was a friend of the newly elected president of the United States. And if a client of mine had said look, we need some capital

> and I think Mr. Vesco would be interested in this kind of operation that we have based on what I know about him, would you please go see him, I wouldn't have hesitated five minutes. I would have put on my hat and I would have sent in my card—I was a lawyer then, not a Judge—I would have sent in my card and said could I see you and said, I understand you are interested.
>
> And there is no reason on God's earth why Mr. Anderson would have done anything different. There is not a scintilla of evidence on March, 1969, that Mr. Vesco is anything but a substantial businessman who happened to be highly regarded by persons from the Government, from the people, highly regard at that time. (Tr. 141-143)
>
> * * * * *
>
> Now, that is the last time I am going to mention Vesco. (Tr. 141-43).

Although the Court attempted to put the matter to rest at that point, Anderson's further objection occasioned yet another instruction on the subject:

> Ladies and gentlemen, let's forget about Mr. Vesco. He has got nothing to do with this case, except he is a human being. If the dealings with Mr. Vesco have relevance, that is for you to decide. The fact that his name is Vesco has nothing to do with it. I told you and I tell you now, if I knew anything about him, I don't know. If I did know him, all I would have known about him is he was a wealthy man who happened to be a friend of the newly elected president of the United States. If I had an opportunity to do business with him, I would have welcomed it . . . (Tr. 1542).

At the next mention of Vesco to which Anderson objected, Judge Knapp told counsel that he was "satisfied that there is no prejudice in the jury's mind on Mr. Vesco." The Judge went on to say: "I base this observation on their reaction every time I have told them if I were around I would have been delighted to deal with Mr. Vesco and they react as though they agreed with me" (Tr. 1689).

In summary, references to Vesco were made only in connection with relevant and admissible evidence. As Judge Knapp observed, Vesco was as relevant as Rick Clinton, who was mentioned far more often in the course of the trial. Both were substantial contributors to Orvis. Any conceivable prejudice to Anderson engendered by his connection to Vesco was fully cured by the Court's extensive instructions on the subject.

POINT V

Anderson's Fifth Amendment rights were not violated by pre-indictment delay or by the grand jury proceedings.

A. Pre-indictment delay

Among the last of Anderson's claims on appeal is his assertion that his Fifth Amendment rights to due process were violated by a pre-indictment delay. A motion to dismiss on this ground should properly have been made prior to trial, pursuant to Rule 12(b)(2), Fed. R. Crim. P. Instead, Anderson raised the issue for the first time after the guilty verdict had been returned. Accordingly, the issue has been waived. *See Estrella* v. *United States*, 429 F.2d 397 (9th Cir. 1970), *cert. denied*, 400 U.S. 1011

(1971); *United States* v. *Garcia*, 422 F.2d 1301 (9th Cir. 1970); *Benson* v. *United States*, 402 F.2d 576, 580 (9th Cir. 1968); *Chapman* v. *United States*, 376 F.2d 705, 707 (2d Cir. 1967); *United States* v. *Beigel*, 370 F.2d 751, 756-757 (2d Cir. 1967); *United States* v. *Bennett*, 364 F.2d 499 (2d Cir. 1966); *United States* v. *Booker*, 363 F.2d 856 (2d Cir. 1966); *United States* v. *Smalls*, 363 F.2d 417 (2d Cir. 1966).

However, assuming *arguendo* that this point had been properly raised below and that this Court were to reach the merits of this claim, the record does not support Anderson's assertion that the delay in this case amounted to a violation of his Fifth Amendment rights. To establish a constitutional violation based on pre-indictment delay two tests must be met: "actual prejudice" must be demonstrated, and, in addition, the Government must be shown to have utilized the delay "as an intentional device to gain tactical advantage over the accused." *United States* v. *Marion*, 404 U.S. 307, 324 (1972); *United States* v. *Schwartz*, 464 F.2d 499 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972); *United States* v. *Parrot*, 425 F.2d 972 (2d Cir. 1970), *cert. denied*, 401 U.S. 979 (1971). This Court has stated that to meet the burden of demonstrating actual prejudice, a defendant must make a particularized showing either that a key defense witness or valuable evidence has been lost during the delay or that the defendant is unable to reconstruct the events surrounding the alleged offense. *United States* v. *Feinberg*, 383 F.2d 60 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968). Furthermore, any alleged prosecutorial misconduct must be proved in order to justify the dismissal of an indictment filed within the applicable statute of limitations period. *United States* v. *Frank*, Dkt. No. 74-2639 (2d Cir. June 27, 1975) slip. op. at 4446; *United States* v. *Brown*, 511 F.2d 920, 923 (2d Cir. 1975). Anderson failed to meet his burden of proof on both of these issues.

Anderson claims that prejudice was shown at trial by the fact that Kilduff could not be pinned down to the date of an executive committee meeting in April. This claim is not meaningful since it cannot be supposed that Kilduff, or for that matter any one, could recall the specific date of a meeting even a few months after the event. Nor is it persuasive for Anderson to speculate that he could have produced alibi witnesses if the indictment had been obtained earlier. Even now Anderson fails to identify any one in particular who was unavailable for the trial, but who would have testified for Anderson at some earlier date.

The nebulous claims about the inability to cross-examine Zalduondo and Mezzetta are without substance. Their difficulty in recalling events was, in itself impeaching of their testimony and of substantial benefit to Anderson. Anderson's general claims, unsupported by particularized showings of prejudice, do not suffice.

Moreover, in making this argument Anderson unfairly charges that the Government sought to capitalize on the delay. This accusation is made with respect to the Government's summation which, Anderson asserts succeeded in undercutting Schmidt's testimony by referring to the impact of the passage of time since the occurrence of the events about which he testified. In fact, that remark made once in passing (but quoted twice by Anderson's Brief at 71 and 77) was not the Government's answer to Schmidt's testimony. The Government blunted Schmidt's testimony at trial by arguing that Schmidt's version of Kilduff's statement may well have been accurate, but, if so, it merely meant that Kilduff, in making the statements attributed to him, was trying at the time to protect his friends (Tr. 2985-2986, 2989). Most importantly, the Government was able to point to the overwhelming evi-

dence against Sloan and Eucker to show that even if Kilduff had said to Schmidt at the time that he had acted alone, the facts were to the contrary (Tr. 2986-89).

The bald claims of prejudice here are wholly insufficient to meet the legal requirements for establishing any Fifth Amendment violation. The mere passage of five years does not itself create such a showing and this Court has rejected such claims involving similar time periods. *See e.g., United States* v. *Schwartz, supra* (four and a half year delay); *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972) (four year, 11 month delay); *United States* v. *Ferrara*, 458 F.2d 868, 875 (2d Cir.), *cert. denied*, 408 U.S. 931 (1972) (approximately four year delay); *United States* v. *Stein*, 456 F.2d 844, 848 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972) (four year, eleven month delay); *United States* v. *Parrott, supra* (three year delay); *United States* v. *Capaldo*, 402 F.2d 821 (2d Cir.), *cert. denied*, 394 U.S. 989 (1968) (three year, four month delay); *United States* v. *Feinberg, supra* (four year, 11 month delay).

Apart from the failure to show actual prejudicial, there is absolutely no proof that the pre-indictment delay was an intentional device by the prosecution to gain a tactical advantage over the accused. The accusation about the comment in the Government's summation with respect to Schmidt does not rise to that level and cannot be imputed retroactively as a reason why the Government did not indict sooner. Anderson has failed utterly to meet his burden of proof and no violation of due process has even been suggested much less established.

B. The grand jury proceedings

Anderson further contends that his Fifth Amendment rights were violated by the Government's decision

not to call Schmidt as a witness before the grand jury.* Schmidt testified at trial that when he was representing Kilduff before the NYSE an examiner told Kilduff that "they would go easy" on him if he implicated others (Tr. 2457). According to Schmidt, Kilduff later said that he had acted alone in falsifying the books and that his partners knew nothing about it (Tr. 2460).

At the outset, it is clear that as a legal matter the Government had no obligation to call Schmidt before the grand jury. The Government is not required to call all available witnesses. *United States* v. *Koska*, 443 F.2d 1167 (2d Cir.), *cert. denied*, 404 U.S. 852 (1971); *United States* v. *Leibowsky*, 420 F.2d 39 (2d Cir. 1969); *accord*, *United States* v. *Schwartz*, 464 F.2d 499, 511 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972). *See also*, *United States* v. *Thompson*, 144 F.2d 604, 605-606 (2d Cir. 1944) (L. Hand, J.).

Furthermore, apart from any legal insufficiency inhering in Anderson's claim, it is factually without merit as well. Anderson argues that had the grand jury heard Schmidt's testimony, it would have decided not to vote this indictment against him. The error in that argument is shown by the fact that Schmidt did not succeed in convincing either the petit jury or the District Court that Anderson was innocent. Even assuming that Schmidt's

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* In fact the government contacted Schmidt to appear before the grand jury and Schmidt indicated that he would invoke attorney-client privilege. Thereafter, the Government requested for Schmidt's benefit a letter from Kilduff's attorney showing publication of the conversation by Kilduff. However, the letter was deemed by Schmidt to be insufficient to show Kilduff's waiver of the privilege. Schmidt took the position, when the Assistant requested his testimony on the grounds that the letter showed a waiver, that if called he would only testify pursuant to a judge's ruling (Tr. 2624-25).

testimony of Kilduff's statements to him was truthful and accurate, insofar as it suggested that not only was Anderson innocent, but that Sloan and Eucker were also, it clearly went too far. The evidence fully contradicted any such claim. Thus, Schmidt's testimony, even taken at face value, appeared to show no more than an effort by Kilduff to protect his friends.

As to the purported threat to Kilduff by Levine, the NYSE examiner, Judge Knapp recalled Schmidt *sua sponte* outside the presence of the jury and thereafter concluded that Schmidt had substantially retreated from his trial testimony. Before the jury Schmidt's version was that Levine told Kilduff that if the latter implicated others, "they would go easy" on him (Tr. 2457). Under questioning by the Court, Schmidt said that Levine said they did not believe that Kilduff acted alone, and if he persisted in saying so "[he was] only going to make it more difficult for [himself] . . ." (Tr. 2612-13). The Court concluded that Levine had been warning Kilduff against the consequences of committing perjury (Tr. 2613). When Anderson's counsel again argued that Schmidt's testimony showed that Kilduff was told to implicate others in order to help himself, the Court said: "That is the impression I got from his direct testimony. It seems to me considerably watered down when he was recalled" (Tr. 2724). After further argument the Court, expressing doubts as to Schmidt's veracity, said:

> Mr. Schmidt's testimony unequivocally said—*whether it is correct or not is another question*—that Mr. Kilduff had been told he should tell the truth. That is all that Mr. Schmidt finally came down with (Tr. 2724) (emphasis added).

Nevertheless, if, contrary to the District Court's impression, Schmidt had been accurate and truthful in relating the incident with Levine, Anderson was not thereby exculpated. At most it constituted evidence of motive to lie and of a prior inconsistent statement by Kilduff for the petit jury to consider in evaluating Kilduff's credibility. The petit jury was given ample opportunity to consider Schmidt's testimony for that purpose (without the benefit of Schmidt's subsequent "watered down" version), and concluded that Kilduff's testimony at trial in fact was truthful. Any claim that the grand jury would have done otherwise is groundless. However, in any event, the Government was not required, as a matter of law, to call Schmidt before the grand jury.

POINT VI

Count Nine of the indictment to which Eucker pled guilty did not have to allege "aggregate indebtedness".

Defendant Eucker appeals from his conviction on Count Nine of the indictment to which he pled guilty. His only claim on appeal is that Count Nine fails to state an offense under Section 8(c)(3) of the Securities Exchange Act of 1934. The argument is entirely without merit and ignores the first part of the statute and regulation which form the basis for Count Nine.

Count Nine charged that the defendants hypothecated fully paid customers' securities in violation of Section 8(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78h, and Rule 8c-1, 17 C.F.R. § 240.8c-1, promulgated

thereunder.* In pleading guilty Eucker admitted that he knowingly caused the hypothecation of fully paid securities *belonging to customers* of Orvis. (Transcript of Plea, March 14, 1975, at 11.) Eucker now argues that neither the charge of the indictment, nor the conduct admitted upon his guilty plea, amounts to a crime under Section 8(c) of the 1934 Act.

The gist of his argument is that a necessary element of the offense under 8(c) is the hypothecation of securities for a sum in excess of aggregate indebtedness. To support his theory Eucker carefully sets out only Section 8(c)(3) which prohibits the hypothecation of securities "for a sum in excess of the aggregate indebtedness . . .," as well as Rule 8c-1(a)(3), to the same effect. Eucker's brief goes on to further to explain the requirement of aggregate indebtedness under those provisions.

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* Count Nine of the indictment reads as follows:

1. From August 1, 1969 to June 3, 1970, Orvis Brothers & Co., was a brokerage firm, a member of the New York Securities and Exchange, and a registered broker and dealer pursuant to Section 15 of the Securities and Exchange Act of 1934, and, as such, was subject to the provisions of Rule 8c-1 (17 C.F.R. Section 240.8c-1), a rule prescribed by the S.E.C. for the protection of investors.
2. From on or about the 1st day of August, 1969 up to and including the 3rd day of June 1970, in the Southern District of New York, FERGUS M. SLOAN, JR., CARL W. ANDERSON, DONALD EUCKER, JOHN J. VILLANI, and THOMAS C. KILDUFF, the defendants, unlawfully, wilfully and knowingly, did, directly and indirectly, hypothecate and arrange for and permit the continued hypothecation of fully paid for securities carried for the account of customers of Orvis under circumstances that permitted such securities to be hypothecated and subjected to liens and claims of pledges in amounts up to $7,000,000.00.

(Title 15, United States Code, Sections 78h and 78ff and 17 C.F.R. Section 240. 8c-1; Title 18, United States Code, Section 2).

In making this carefully structured argument Eucker conveniently ignores the fact that Section 8(c)(3) is only one of the three subsections in both the statute and the accompanying regulation. The use of the disjunctive in both the statute and the regulation indisputably demonstrates that a violation of any one of the subsections of Section 8(c) would constitute an offense, without reference to any of the other subsections. *See, e.g.*, *United States* v. *Schwartz*, 464 F.2d 499 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972) (violation of 8(c)(3) alone is sufficient to constitute violation of the statute).

Thus, the Government need not have proceeded under subsection (3) of Section 8(c) and, indeed, it never intended to do so. Eucker was first put on notice of this by the indictment, which did not allege hypothecation in excess of aggregate indebtedness. In addition, the Government's response to Eucker's request for a bill of particulars stated that aggregate indebtedness was "irrelevant and immaterial." Choosing to ignore that response, Eucker moved, the day before his guilty plea, to dismiss Count Nine for failure to allege aggregate indebtedness. The District Court denied the motion without opinion and accepted Eucker's guilty plea to Count Nine, on the explicit understanding that he would take the appeal now before this Court.

In choosing this course of action, Eucker never confronted the substantial proof against him under Count Nine of the indictment. Had the Government presented its case against Eucker on Count Nine, it would have proved he was responsible for the hypothecation of fully-paid customer securities held by Orvis for safekeeping by ordering Lanz to remove such securities from the Orvis vault, where they were segregated, and to commingle them with other securities to secure bank loans for Orvis (Tr. 1126-1132). This resulted in the fully

paid for customers' securities being subjected to bank liens of over $7,000,000. These activities constituted a massive violation of Section 8(c)(1) and Rule 8c-1(a)(1) which prohibit the commingling of customers' securities without the written consent of each customer.*

Eucker misstates the law in claiming that the hypothecation of fully-paid customers' securities is legal except when aggregate indebtedness is exceeded. Apart from aggregate indebtedness, a broker's use of fully-paid customrs' securities as collateral for loans amounts to conversion and fraud. Loss, *Securities Regulation*, Vol. II (2d Ed. 1961) at 1200, n.41: Weiss, *Registration and Regulation of Brokers and Dealers* (1965) at 97, n.10; *SEC* v. *Lawson*, 24 F. Supp. 360, 362 (D.Md. 1938). *In re Aldrich Scott & Co., Inc.*, 40 SEC 775, 776 (1961); *In re Thompson & Sloan, Inc.*,.40 SEC 451, 454 (1961); *In re Investments Registry of America, Inc.*, 21 SEC 745, 752 (1946). The District Court analogized Eucker's acts to larcey at common law, to which defense counsel would only reply that it was a common practice on Wall Street, a position boldly taken again on appeal (Transcript of Sentencing, June 16, 1975 at 100; Eucker's Brief at 5).**

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* On the face of Orvis' stock records, admitted into evidence at Anderson's trial (GX 153, 154), commingling of fully paid securities is clearly evident. The testimony and other trial exhibits demonstrated that the fully paid customer securities required to be segregated for safekeeping were hypothecated at Eucker's direction because Orvis lacked the cash to pay down the bank loans or the securities to effect proper substitution (Tr. 1126-32).

** Eucker relies on figures demonstrating that in 1970 many firms had hypothecated fully paid customers' securities. It is of no little importance that several of the firms which were engaged in these practices were, like Orvis, on the brink of financial ruin and have since gone out of business (namely, du Pont, Goodbody and Walston).

[Footnote continued on following page]

However, it is even more revealing to compare the market value of all customers' securities pledged as collateral by those firms to the market value of securities "pledged in error." As to Orvis fully 37.7% of all customers' securities hypothecated to secure bank loans were fully paid securities purportedly "pledged in error." Most of the other firms' pledges of fully paid securities constituted only small percentages of all securities pledged:

Firm	*Market Value Of Customers' Securities Hypothecated*	*Customers Fully Paid Securities Pledged In Error*	*Percentage Of Securities Pledged In Error*
Orvis	$ 15,808,772	$ 5,965,146	37.7%
Merrill Lynch	$377,915,300	$ 3,482,986	.9%
Bache	$146,987,387	$24,896,949	16.9%
duPont	$240,973,394	$19,850,736	8.2%
Glore Forgan Goodbody	$142,830,852	$18,957,886	13.2%
Hornblower	$ 73,922,824	$10,298,936	13.9%
Paine, Webber	$ 46,588,200	$ 1,909,741	4.0%
Walston	$100,847,100	$ 5,049,415	5.0%
E.F. Hutton	$ 82,063,850	$ 2,519,269	.2%
Dean Witter	$144,145,713	303,431	.2%

[With respect to all firms except Orvis, figures for market value of securities hypothecated and securities pledged in error derived from Baruch, *Wall Street Security Risk* (1971) at 34, 36. With respect to Orvis, *see* X-17A-5 (GX 74)].

Most of these firms pledged such small percentages of fully paid securities that they had a colorable claim of legitimate operational errors. Orvis' figures can only be explained by deliberate illegal hypothecation, as the evidence at trial confirmed.

Eucker's acts are defended on the further ground that there was no intent permanently to deprive the customers of their securities, since a given customer's securities could be retrieved from the bank but substituting other securities (Transcript of sentencing at 100-01; Eucker's Brief at 10, 12). However, the evidence at trial amply demonstrated that Orvis was unable to effect substitution because it was $2,500,000 short of the securities or cash need for effect full substitution. (Tr. 1131). Eucker's claim to the contrary (Eucker Brief at 12 n.*) is simply in error.

Contrary to Eucker's claim that there is no crime, here the hypothecation of fully-paid customers' securities, as alleged in the indictment, states a crime under Section 8(c)(1) which provides that it shall be unlawful for any broker or dealer:

> (c) In contravention of such rules and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customers under circumstances (1) that will permit the commingling of his securities without his written consent with the securities of any other customers. . . .

Rule 8c-1(a)(1) amplifies the statute:

> (a) General provisions. No member of a national securities exchange, and no broker or dealer who transacts a business in securities through the medium of any such member shall, directly or indirectly hypothecate or arrange for or permit the continued hypothecation of any securities carried for the account of any customer under circumstances:
>
> (1) That will permit the commingling of securities carried for the account of any such customer with securities carried for the account of any other customer, without first obtaining the written consent of each such customer to such hypothecation. . . .

As a practical matter, any hypothecation of customers' securities results in commingling of securities of in-

dividual customers.* Thus essentially Section 8(c) prohibits hypothecation absent consent of the customer. Such consents from customers are only available to a limited degree with respect to margin accounts. The usual agreement between a margin customer and the broker grants consent to commingle securities up to the amount of the customer's indebtedness to the broker.** However, the consent does not cover "excess margin" securities, those securities for which the margin customer has paid in full, or securities carried for a special cash account, which are by definition fully-paid securities. *See* C.F.R. § 220.4(c). Since consents to commingle do not cover securities which are excess margin or fully paid securities in special cash accounts, such securities are not available to the broker for hypothecation. *See generally*, Weiss, *Registration and Regulation of Brokers and Dealers,* 95-96 (1965).

Thus, Section 8(c)(1), in prohibiting commingling without consent, forbids the hypothecation of fully paid customers' securities. This is a principle recognized in the entire regulatory scheme governing hypothecation. It is assumed throughout the pertinent regulatory provisions that hypothecation would not be undertaken by the broker, except to the extent of the customer's indebted-

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* In Orvis' case as of August 31, 1969, all borrowings totalling $11,400,000 were collateralized by $15,808,772 in securities (X-17A-5; GX 74). These borrowings were obtained through only eleven bank loans, the smallest of which was for a sum of $200,000 collateralized by $282,200 worth of securities. Thus, at any one time securities of numerous customers were necessarily utilized to collateralize any one loan.

** The Orvis "Customer's Agreement (Margin Accounts)" provided that the customers' securities were subject to Orvis' lien for the customer's liabilities to Orvis and that "any part or all such collateral" may be pledged or repledged by Orvis (¶ 2).

[Footnote continued on following page]

ness to the broker.* Thus, for example, the applicable rules of the New York Stock Exchange and the National Association of Securities Dealers (NASD) prohibit the hypothecation of securities for a greater amount than is "fair and reasonable" in view of the particular customer's indebtedness to the broker. Rule 402 of the NYSE; Section 19(c), Art. III, Rules of Fair Practice of the NASD.

The prohibition of Section 8(c)(1) against the hypothecation of fully-paid securities is further seen in the exception to 8(c)(1) which is carved out by 17 C.F.R. § 240.8c-1(c). That regulation permits, with respect to

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* Congress adopted the hypothecation section of the 1934 Act, Section 8(c) in response to the fact that "several financial losses have been sustained by investors from time to time in cases where a broker . . . pledged [his customers' securities] along with his own securities to finance his private speculative commitments. These practices, as well as the loaning of a customer's security without written authority, are prohibited by the proposed bill." Sen. Rep. No. 73-729, 73rd Cong., 2d Sess. 11 (1934).

Upon the issuance of the hypothecation rules promulgated thereunder, the SEC stated that:

> The new rules are designed to furnish added protection to customers against losses which may result from brokerage failures. It has not previously been illegal under the usual kind of "customer's agreement" for a broker or dealer to commingle customers' securities with his own as collateral for loans used by the firm in its business as a dealer or trader for its own account. Likewise, it has not been illegal under such "customer's agreements" for brokers and dealers to borrow more on their customer's securities than was owed them by the customers. Where the broker or dealer failed under such circumstances, the risk of loss to customers was substantially increased.
>
> To this end, the rules, in effect, prohibit brokers and dealers from risking the securities of their customers as collateral to finance their own trading, speculating on underwriting ventures.

Sec Securities Exchange Act Release No. 2690, Nov. 15, 1940, at 1.

special cash accounts, commingling without consent up until the time that the security is paid for in full. This permits a broker to take day-loans on securities delivered to him for cash account customers as to which he must pay in full within four days, but as to which the customer has seven calendar days to make full payment. Upon full payment, the hypothecation must cease.

While the allegations of Count Nine of the indictment are not cast in terms of the precise terminology of Section 8(c)(1), there is no requirement that they be so phrased. Rule 7(c), F. R. Crim. P.; *United States* v. *Berlin*, 472 F.2d 1002, 1007 (2d Cir.), *cert. denied*, 412 U.S. 949 (1973); *United States* v. *Cluchette*, 465 F.2d 749, 753 (9th Cir. 1972); *Hockenberry* v. *United States*, 422 F.2d 171, 173-4 (9th Cir. 1970). In reviewing the sufficiency of an indictment after conviction of the defendant, "no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." *Hagan* v. *United States*, 285 U.S. 427, 433 (1932); *United States* v. *Cluchette, supra*, 465 F.2d at 752; *Kaneshiro* v. *United States*, 445 F.2d 1266, 1269 (9th Cir.), *cert. denied*, 404 U.S. 992 (1971); *Ramirez* v. *United States*, 318 F.2d 155, 157 (9th Cir. 1963); *Marteney* v. *United States*, 216 F.2d 760, 762 (10th Cir. 1954), *cert. denied* 348 U.S. 953 1955). This rule is most appropriate in a case such as this where a defendant has entered a plea of guilty.*

In charging the defendants with the hypothecation of fully paid customer securities, the indictment stated a vio-

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* With respect to the wisdom of Eucker's decision to plead guilty in this case, it should be recalled that the District Court opined that the evidence against him was so overwhelming that a directed verdict of guilty would be properly be entered against him if such a thing existed in a criminal case (Tr. 1091).

lation of Section 8(c)(1). Eucker has built and destroyed a strawman in claiming that the Government failed to allege aggregate indebtedness pursuant to Section 8(c)(3) and Rule 8c-1(a)(3). The Government did not seek to allege that portion of the statute or the rule. As to the violation that was alleged, the indictment is sufficient.

However, in any event, it is clear that aside from Section 8(c), the hypothecation of fully paid for customers' securities constitutes a fraud in violation of Sections 10(b) and 15(c) of the 1934 Act, 15 U.S.C. § 78j(b), 78o(c), as well as § 17(a) of the 1933 Act, 15 U.S.C. § 77q(a). *SEC* v. *Lawson*, 24 F. Supp. 360, 362 (D. Md. 1938); *In re Aldrich Scott & Co., Inc.*, 40 Sec. 775, 776 (1961); *In re Thompson & Sloan, Inc.*, 40 Sec. 451, 454 (1961); *In re Investment Registry of America, Inc.*, 21 Sec. 745, 752 (1946); Loss, *Securities Regulation*, Vol. II (2d Ed. 1961) at 1200, n. 41; Weiss, *Registration and Regulation of Brokers and Dealers* (1965) at 97, n. 10 95 at n. 5.* It is well settled that miscitation of the proper statutory section does not invalidate an indictment, so long as the facts alleged constitute an offense against the United States and the defendant was not misled to his prejudice by the miscitation. *United States* v. *Rivera*, 513 F.2d 519, 533 n. 21 (2d Cir. 1975); *United States* v. *Van West*, 455 F.2d 958, 959 (1st Cir. 1972); *United States* v. *Cook*, 412 F.2d 293, 294 (3rd Cir.), *cert. denied*, 396 U.S. 969 (1969); *Dendy* v. *United States*, 290 F.2d 222, 223 (2d Cir. 1961); *United States* v. *Bazzell*, 187 F.2d 878, 886 (7th Cir.), *cert. denied*, 342 U.S. 849 (1951); *Gaunt* v. *United States*, 184 F.2d 284, 289 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951).

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* It is interesting to note that Eucker relies on Weiss' text at 95, n. 5 quoting it virtually in full (Eucker's Brief at 15), but he omits the last sentence of that footnote which states that "improper use of customers' free or excess securities would violate general anti-fraud provisions."

Eucker chose to plead guilty in this case and in doing so he admitted to conduct which clearly criminal under the anti-fraud provisions of both the 1933 and the 1934 Acts. In entering his guilty plea, Eucker admitted to criminal conduct which was not merely *malum prohibtum;* it was *malum per se.** Eucker could claim no prejudice if this Court were to uphold the guilty plea on the basis of a different section of the securities laws than the section cited in Count Nine. Indeed, upon a finding that Count Nine of the indictment alleged, and Eucker's plea admitted, facts constituting a criminal violation of the anti-fraud provisions of the Securities Exchange Act of 1934, any sentence to be imposed would be governed by provisions of 15 U.S.C. § 78ff(a)—the very same statutory predicate for the sentence already imposed by the District Court. Accordingly, no remand for resentencing would even be necessary here. *Cf. United States* v. *Rivera, supra*, 513 F.2d at 533.

Eucker's conviction upon his plea of guilty should be affirmed.

POINT VII

The District Court did not abuse its discretion in denying Sloan's motion to withdraw his guilty plea.

Sloan seeks to withdraw his plea of guilty to Count One of the Indictment upon which he was sentenced to a term of imprisonment of a year and a day. His claim on appeal is that the Government induced him to plead

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* Prior to entering the guilty plea, Eucker and his counsel were told by the District Court that "hypothecating securities which belong to someone else is common-law larceny, so that it is not really a new crime that we are dreaming up. . ." (Transcript of plea proceedings, Mar. 14, 1975 at 4, Eucker's Appendix at A 30).

guilty by promising to "go to bat" for him if he pled guilty and cooperated. He contends that his promise was broken and therefore his plea was wrongly induced.

On this issue Sloan had the burden of proof. The District Court's factual conclusions in denying the motion are so well supported by the record that the denial cannot be said to constitute an abuse of discretion. *United States* v. *Podell*, Dkt. No. 75-866, *slip.op.* at 4371 (2d Cir. June 24, 1975); *United States* v. *Giuliano*, 348 F.-2d 217 (2d Cir. 1965), *cert. denied* 382 U.S. 946 (1966); *United States* v. *Hughes*, 325 F.2d 789, 792 (2d Cir. 1964). *United States* v. *Smiley*, 322 F.2d 248 (2d Cir. 1963); *United States* v. *Lester*, 247 F.2d 496 (2d Cir. 1957).

The facts on this issue are not in dispute. Sloan and the Government are in agreement that the Assistant United States Attorney, Kenneth R. Feinberg, told Sloan's attorney that if Sloan pled guilty and cooperated, the Government would "go to bat" for him.* Sloan further contends that the Government did not "go to bat" for him. The Government does not dispute that fact.**

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* There is no claim at this point that the Government agreed to recommend a non-jail sentence to the Court. Although initially this claim was made, Sloan's attorney's, Mr. Rosen, later retracted it, conceding that the Assistant had never made such a promise (Rosen Affidavit, sworn to June 23, 1975, Sloan's Appendix at 73a).

** It was conceded by Sloan's attorney at the sentencing that in mitigation of sentence, the Government stood ready to tell the Court of Sloan's personal problems. However, the Government was not prepared to inform the Court that Sloan had cooperated when in fact he had not. The absence of the Government's statement as to cooperation did not give rise to Sloan's motion to withdraw his guilty plea. Rather, the source of Sloan's concern

[Footnote continued on following page]

The only issue is whether Sloan in fact cooperated, thereby obligating the Government to "go to bat" for him.

With respect to cooperation, Sloan claims that he cooperated "candidly" (Sloan Affidavit, sworn to June 23, 1975, Sloan's Appendix 70a). By contrast, the Government informed the District Court both in its letter to the Court and in the affidavit in opposition to this motion that in fact Sloan had not cooperated in that he had not been truthful with the Government. After his plea, Sloan presented to the Government a version of this case in which he portrayed himself as innocent, and Anderson as criminally culpable. It was not, as Sloan casts it, that through this proffered cooperation Sloan "could provide nothing if called upon to testify at the trial of Anderson . . ." (Sloan's Brief at 10). Rather, Sloan was clearly willing to be helpful in the trial against Anderson, but the Government could not vouch for his credibility in light of his self-exculpatory statements.

As to the validity of the Government's judgment that Sloan was lying about his own involvement, the proof at Anderson's trial established that fact overwhelmingly. The District Court observed at the trial that Sloan's guilt was so clear that a directed verdict against him would have been appropriate if such a thing were permitted in a criminal case (Tr.1091). The Court

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was a letter to the Court written by the Assistant in compliance with the Court's request for a recommendation as to sentencing and for factual information about the defendant's role in this case. It should be noted that although the Court initially requested it to do so, the Government made no recommendation as to sentence. Furthermore, the District Court in its memorandum opinion stated that "with minor exceptions the letter did not add more to what the Court had learned during Anderson's trial and, in any event, "the letter was totally without effect upon the sentence imposed . . ." (Memorandum Opinion of July 2, 1975 at 3).

stated at the sentencing that Sloan's protestations of innocence stood in contradiction to the record (Sentencing, June 16, 1975 at 12, Sloan's Appendix at 58a)). Moreover, in its memorandum opinion the Court found that the Government arrived in good faith at its assesment that Sloan had been untruthful and had failed to cooperate (Memorandum Opinion at 1,3).

It is clear that under these circumstances, where the Government has in good faith concluded that a defendant was lying, it cannot allow him to testify, nor can it properly inform the Court that cooperation was in fact rendered. The Government nevertheless remains responsible for providing the Court with information about the defendant, when specifically requested to do so.* The Government did not in any respect break its promise to Sloan, since its obligation to "go to bat" was vitiated by Sloan's failure to cooperate.

The cases relied upon by Sloan are inapposite. The holding of *Santobello* v. *New York*, 404 U.S. 257 (1971) is limited to the prosecution's violation of unequivocal promises:

> "It is well-established that if an accused enters a plea of guilty upon the basis of a promise made by an official representing the prosecution, *and the promise is unequivocal*, then he is entitled to with-

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* As reflected in the papers submitted by the Government in opposition to the motion, counsel for both Anderson and Eucker contacted the Government when the Court requested information about their clients' role in this case. As a result, they were given an opportunity to suggest that the letter be revised to their clients' benefits. Sloan's attorney never contacted the Government and therefore never availed himself of the same opportunity on his client's behalf (Feinberg affidavit, sworn to July, 1975, Sloan's Appendix at 77a-78a).

draw his plea if the promise is unfulfilled" (emphasis supplied). *Schoultz* v. *Hocker*, 469 F.2d 681, 682 (9th Cir. 1972).

Where a defendant fails to cooperate as agreed, the Government is not required unilaterally to fulfill its half of the violated agreement. *United States* v. *Nathan*, 476 F.2d 456 (2d Cir. 1973); *United States* v. *Ciotti*, 469 F.2d 1204 (3d Cir. 1972). Moreover, given the circumstances and language employed here, Sloan could hardly have believed that the determination of whether he had "cooperated" would be left to him rather than the Government. Such a belief, in any event, would not be consistent with a reasonable interpretation of the language employed.

In any event, the motion to withdraw the guilty plea would have been properly denied on the ground that Sloan did not rely on the Government's promise in pleading guilty. The minutes of his plea reflect his statement that he received no promises or predictions as to the sentence which the Court would impose. The record on this issue further reflects that Sloan's plea was induced far more directly as a result of his attorneys' statements and efforts than as a result of anything the Government said or did.* Absent significant reliance on the Govern-

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* Sloan's attorney, Mr. Rosen, attested in his affidavit in support of the motion, that although the Assistant United States Attorney only agreed to "go to bat" for Sloan, he concluded that the Government would recommend "no incarceration" and proceeded to tell Sloan that "incarceration would not be directed by the Court if Mr. Feinberg [the Assistant] kept his word." Mr. Rosen further attested that he believed "Mr. Sloan's compliance concerning his plea was occasioned by his reliance on my discourse with him, as well as conversations with Mr. Cohn" (Rosen Affidavit, sworn to June 23, 1975, Sloan's Appendix at 73a). If Sloan relied on anything here, it is evident that he relied on his own attorney's unfounded and overly optimistic prediction, which apparently included a misstatement to his client of the extent of the prosecution's commitment.

ment's promise, the plea cannot be withdrawn on a claim that the promise was not kept. *United States* v. *Podall*, Dkt. No. 75-1019 (2d Cir., June 24, 1975), slip op. at 4371.

Finally, there is no merit to the claim that the District Court wrongfully denied the request for a hearing. There are no factual issues to be resolved in this case, the salient facts having been conceded by both sides. Accordingly, the Court was well within its discretion in declining to hold any such hearing. *United States* v. *Erlenborn*, 483 F.2d 165 (9th Cir. 1973).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

AUDREY STRAUSS,
ROBERT J. COSTELLO,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

AUDREY STRAUSS, being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 29th day of September, 1975 she served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

STANLEY S. ARKIN, ESQ.
300 Madison Avenue
New York, New York 10017

CARRO, SPANBOCK, LONDIN, RODMAN & FASS
10 East 40th Street
New York, New York 10016

SAXE, BACON & BOLAN
39 East 68th Street
New York, New York 10021

And deponent further says that she sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Audrey Strauss
AUDREY STRAUSS
Assistant United States Attorney

Sworn to before me this

29th day of September, 1975.

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1977